JUN 22 1974

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-6935

MARCEL YOUAKIM and LINDA YOUAKIM individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Plaintiffs-Appellants

- vs -

JEROME MILLER individually and as Director of the DEPARTMENT OF CHILDREN AND FAMILY SERVICES and the DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Defendants-Appellees

JURISDICTIONAL STATEMENT

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- vs -

JEROME MILLER individually and as Director of the DEPARTMENT OF CHILDREN AND FAMILY SERVICES and the DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JURISDICTIONAL STATEMENT

Appellants, representatives of a class, by their attorney PATRICK A. KEENAN, DePaul Law Clinic, respectfully appeal the parts of decision and judgment of the United States District Court for the Northern District of Illinois, which granted summary judgment for the Appellee state officials, denied an injunction against the operation of the statute, and dismissed the Complaint. This Statement is filed to show that the Supreme Court has jurisdiction of the appeal and that the questions presented are substantial.

OPINION BELOW

The February 28, 1974 Memorandum of Decision of the three-judge District Court for the Northern District of Illinois, Eastern Division granting summary judgment in favor of Defendants-Appellees and dismissing the complaint to enjoin the execution of a state statute is not yet reported. Said decision declared that this cause is a class action. A copy of the Memorandum of Decision is attached as Appendix A (14 pages).

JURISDICTION OF THIS COURT

This was a civil rights class action in which appellants, foster parents and minor wards of the state--foster children--related to one another sought an injunction against the operation of that part of the Illinois statutory foster care scheme which denies full foster care payments to Appellants for the sole reason that they are related. Appellants contend that they are discriminated against because of their related status, and that such discrimination violates the Social Security Act and the Equal Protection Clause of the United States Constitution.

The action was filed on March 13, 1973. Jurisdiction of the District Court was based on 28 U.S.C. 1343(3)(4) and 42 U.S.C. 1983. A three-judge court was convened. 28 U.S.C. 2281, 2884. On cross motions for summary judgment the District Court decided on February 28, 1974 that: First, the action could be maintained as a class. Second, the Eleventh Amendment did not bar the suit. Third, the Illinois foster care scheme, though concededly discriminatory, did not violate the Equal Protection Clause or the Social Security Act, and accordingly the suit to enjoin the operation of the

statute was dismissed without trial. The Plaintiffs appeal only the third part of the February 28, 1974 decision.

The Notice of Appeal was filed in the United States District Court (N.D. Ill. E.D.) on April 23, 1974.

The Supreme Court is authorized to decide a direct appeal from a three-judge district court decision dismissing a suit to enjoin the operation of a state statute. 28 U.S.C. 1253. King v. Smith, 392 US 309 (1968); Lewis v. Martin, 397 US 552 (1970); Townsend v. Swank, 404 US 282 (1971).

QUESTIONS PRESENTED

1. The Illinois foster payment scheme creates two classes of persons for foster care benefits: foster children living with foster parents who are strangers and foster children living with foster parents who are related to them. Full foster care payments are made to the former class and none are made to the latter. Does this classification violate the Fourteenth Amendment to the U.S. Constitution, and specifically the Equal Protection Clause?

2. The Illinois foster payment scheme creates two classes of persons for foster care benefits: foster children living with foster parents who are strangers and foster children living with foster parents who are related to them. Full federally subsidized foster care payments are made to the former class and none are made to the latter. Does this classification violate the Social Security Act, 42 U.S.C. §§601, 608 and the Supremacy Clause, U.S. Const. Art. VI §2?

STATUTES INVOLVED

1. The State statutes challenged provide for payment to foster parents who care for children who are wards of the State--foster children, unrelated to them. But the statutes deny these payments to foster parents who care for wards of the State--foster children who happen to be related to their foster parents. Ill. Rev. Stat., Ch. 23 §2212.05 and §2212.17 (1971) provide in relevant part:

> "Facility for child care" or "child care facility" means any person, . . . who or which receives or arranges for care of placement of one or more children, unrelated to the operator of the facility. Dept. of Children and Family Services. Ill. Rev. Stat. Ch. 23, §2212.05 (1971)
>
> and
>
> "Foster family home" means a facility for child care in residences of families who receive no more than 8 children unrelated to them, . . .
> Ch. 23, §2212.17 (emphasis added)
> (Entire text set out in Appendix B.)

2. The general powers and duties of the Illinois Department of Children and Family Services (hereafter DCFS) and its Director, Defendant-Appellee Jerome G. Miller are set out in Ill. Rev. Stat., Ch. 23, §5001 and 5005 (1971). The Department was created to provide social services to children and their families (§5001).

> The Department shall establish and maintain tax-supported child welfare services and extend and seek to improve voluntary services throughout the State, to the end that services and care shall be available on an equal basis throughout the State to children requiring such services. (§5005, ¶5) (Entire texts set out in Appendix C.)

3. Under Illinois law the only persons who have a legal duty to support their relatives are natural and adoptive parents. Ill. Rev. Stat., Ch. 23 §2-11 (1971).

(Entire text set out in Appendix D.)

4. Certain regulations of the Illinois DCFS are concerned with licensing of and payment to foster homes. See Ill. DCFS Placement Manual Ch. 3, §5 at p.97. (Entire text set out in Appendix E.) In its Memorandum of Decision, the District Court correctly observed that these regulations did no more than summarize what is apparent on the face of the statutes. The Court accordingly addressed itself only to the challenged statutes.

5. Not challenged, but involved in this case are certain sections of the Social Security Act (Ch. 42 U.S.C. §§601, 608) (Entire texts set out in Appendix F and G, respectively.)

Section 601 mandates a clear national policy of encouraging the care of dependent children in their own homes or in the homes of relatives whenever possible. State appropriated child welfare plans must be designed to help maintain and strengthen family life, and to help such parents or relatives.

Section 608 provides for federal funds to be paid to children care for "in the foster family home of any individual." Ch. 42 U.S.C. §608(b)(1). There are no exclusions.

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Illinois generally subsidizes its wards placed in foster homes at the rate of $105.00 per month paid from HEW funds earmarked for dependent children in foster care. Eligibility for state wards is automatic. But one relatively small group of about 1,500 of the state's twenty thousand wards are barred from receiving this subsidy. These are the children who are placed in homes of their relatives. The excluded children are otherwise in the identical situation as all other state wards who are placed in homes of strangers.

The relatives' homes in which the Appellant children are placed must and do conform to all the standards generally applicable to all foster homes. The Appellees have the identical duty to provide care, service, and subsidy to all state wards including the Appellant related foster children. The duty includes finding the best possible placement for each child. Perhaps most important, by federal and state mandate, whenever possible the child must be placed in the home of a relative.[1]

Yet despite the clear mandate of the statutes, it is the group of children who are placed with relatives who are denied the subsidy.[2]

The facts of this case are extremely simple. The Illinois foster care system denies full subsidy to children admittedly in the optimum placement and grants full subsidy to all others. It is inherently discriminatory. It results in undue hardship. It violates the rights of children to equal protection of law.

1] The relatives with whom the children are placed have no legal duty to contribute to the support of the foster children, and the state cannot expect contribution. Only natural and adoptive parents are liable for the support of their children.

2] Some of these 1,500 children have learned that a small AFDC subsidy of about $60 per month (from sources other than foster care funds), may be available upon satisfaction of criteria in addition to state wardship. Many members of the Appellants' class are not even aware the AFDC subsidy may be available.

The scheme frustrates, and is directly opposed to the sections of the Social Security Act and of the parallel state laws that require family ties to be encouraged and strengthened and children to be placed with relatives whenever possible.

In the District Court Appellants sought to enjoin execution of the statutes which establish this system. (Ill. Rev. Stat., Ch. 23 §§2212.05, 2212.17, 1971).

Appellants alleged by affidavits, and offered to prove at trial, that there is a shortage of qualified foster homes in Illinois; that the present system prevents the placement of some wards with relatives willing to take them; and creates severe hardship for some foster parents now caring for state wards related to them. They are prepared to prove that some children could be removed from expensive institutional placement and into related foster homes if the full subsidy were readily available.

Appellees herein admitted the scheme is obviously discriminatory. The District Court specifically found that this discrimination causes some children to be separated from their relatives for mere financial reasons. (Appendix A, Mem. of Dec. p.11)

The District Court nonetheless decided that the challenged scheme did not violate equal protection of the laws, and was not inconsistent with the Social Security Act. Summary judgment was entered for the Defendants-Appellees.

THE QUESTIONS ARE SUBSTANTIAL

INTRODUCTION

For four reasons the questions presented on this appeal are substantial and have great public importance which warrant consideration with full briefs and arguments.

1. Discrimination Against Children

The Court has given very thorough scrutiny to cases which allege discrimination against a group of children. Their rights to equal protection are jealously guarded because the discrimination they suffer is based on mere status for which the children are in no way responsible.

The case on appeal charges discrimination against a group of children who were placed in a particular category by the state and then denied federally subsidized benefits because of the classification.

2. Subsequent Supreme Court Decision

On April 2, 1974 this Court summarily affirmed Williams v. Wohlgemuth, 366 F Supp 541 (W.D. Pa. Dec. 11, 1973) affd. No. 73-1188, 42 USLW 3551, a three-judge court opinion which enjoined the execution of part of the Pennsylvania welfare code. The section granted federally funded payments to certain children living with relatives but denied payment to identically situated children living with non-relatives.

Williams is another case where the federal court enjoined a state's attempt arbitrarily to deny benefits to children solely on the basis of their status--in this case because they resided with a nonrelative. The court recognized their financial need, and the state's duty to meet their need was identical, not related to where or with whom they lived.

It is the mirror image of the case on appeal.

3. Conflicting Federal Court Decision

A federal court in South Dakota recently decided the identical question presented by Appellants. In Clampett v. Madigan (CIV 73-4018 D.S. Dak. So.Div. Dec. 6, 1974) Chief Judge Fred J. Nichol enjoined the operation of part of the South Dakota foster care scheme. The scheme provided that foster children who lived with strangers automatically received full subsidy and foster children placed with relatives could, upon establishment of eligibilty get a small AFDC subsidy.

The South Dakota court decided the scheme was inconsistent with parts of the Social Security Act which mandate placement with relatives wherever possible and encourage the development of family ties. The South Dakota scheme--and the Illinois scheme--set up an economic disincentive and have the direct opposite effect. They pull families apart.

4. Construction of a Federal Law

The Court is presented with conflicting decisions about the rights of children with the same needs to the same support payments funded by the major federal revenue sharing law: the Social Security Act, 42 U.S.C. §601, 608. A question of federal supremacy is involved. U.S. Const. Art. VI §2.

The case on appeal is one of great significance to state legislators, to HEW administrators, to state foster care program and welfare administrators, and to the lower courts. Most importantly the case has critical significance to all of the unfortunate children who cannot live with their parents, who wish to live with their relatives, and who must look to the state as the sole source of care, guidance and support.

The questions presented are substantial.

I. THE ILLINOIS FOSTER PAYMENT SCHEME CREATES TWO CLASSES OF PERSONS FOR FOSTER CARE BENEFITS: FOSTER CHILDREN LIVING WITH FOSTER PARENTS WHO ARE STRANGERS AND FOSTER CHILDREN LIVING WITH FOSTER PARENTS WHO ARE RELATED TO THEM. FULL FOSTER CARE PAYMENTS ARE MADE TO THE FORMER CLASS AND NONE ARE MADE TO THE LATTER. THIS CLASSIFICATION VIOLATES THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, AND SPECIFICALLY THE EQUAL PROTECTION CLAUSE.

Illinois law confers a right of support from the state to all children who become foster children--wards of the state. Once a state posits a judicially enforceable right on behalf of all children to needed support, there is no constitutionally sufficient justification for denying some children an essential right. Gomez v. Perez, 409 US 535, 93 S. Ct. 872 (1973); New Jersey Welfare Rights Organization v. Cahill, 411 US 619, 93 S. Ct. 1700 (1973); Williams v. Wohlgemuth, 366 F Supp 541 (W.D. Pa. Dec. 11, 1973 p.8 supra). Williams was summarily affirmed by this Court on April 2, 1974, 42 USLW 3551, after Appellants' case was dismissed.

Appellants have absolutely no control over actions of the State of Illinois regarding adjudications of wardship or placement. Their burden has absolutely no relationship to individual responsibility. Weber v. Aetna Life and Casualty Ins. Co., 406 US 164, 92 S. Ct. 1400, 31 L.Ed2d 768 (1972). Compare Stanley v. Illinois, 405 US 645, 92 S. Ct. 1208 (1972). And the legislative classification of the Illinois scheme may also be in violation of the Due Process Clause of the Fourteenth Amendment, according to the reasoning in U.S. Dept. of Agriculture v. Moreno, 413 US 528, 93 S. Ct. 2821 (1973).

In upholding the discriminatory Illinois system the District Court said that:

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> This classification, the wisdom of which is not for us to determine, bears a rational relationship to the legitimate purpose of attempting to assure that foster homes are made available. Some related foster parents may not be able to afford the responsibility of caring for additional children, but the state argues that the scheme was not enacted to alleviate this problem. . .
> (App. A, p.8)

The District Court decided that the classification was necessary to insure that the limited funds available for foster care were put to the best use and that the challenged scheme was designed to provide for allocation of funds to secure the maximum number of foster parents. The District Court surmised that the state was attempting to accomplish this by distributing the funds only to persons who would otherwise have no particular reason or incentive for becoming foster parents (App. A, p.8).

The District Court here accepted the reasoning of the Ramos decision and applied it to Appellants' case. It improperly placed relatives into the classification of natural parents, equating what the Court perceived to be a moral duty with the legal duty of support. The District Court erred. See Williams v. Wolgemuth, 366 F Supp 541 (1973) affd. 42 LW 3551 (1974); Lewis v. Martin, 397 US 552, 90 S. Ct. 1282 (1970); King v. Smith 392 US 309, 88 S. Ct. 2128 (1968); Marotti v. White, 342 F Supp 823 (D. Conn. 1972); Jenkins v. Georges, 312 F Supp 289 (W.D. Pa. 1969).

Appellants alleged and are prepared to prove at trial that if the full foster case subsidy were provided, recruitment of relatives would be much more efficient and less expensive than development of new facilities in the homes of strangers; that more children could be placed in foster care with their relatives; that fewer children would be kept in institutions. Thus the overall cost of child care would be reduced.

II. THE ILLINOIS FOSTER PAYMENT SCHEME CREATES TWO CLASSES OF PERSONS FOR FOSTER CARE BENEFITS: FOSTER CHILDREN LIVING WITH FOSTER PARENTS WHO ARE STRANGERS AND FOSTER CHILDREN LIVING WITH FOSTER PARENTS WHO ARE RELATED TO THEM. FULL FEDERALLY SUBSIDIZED FOSTER CARE PAYMENTS ARE MADE TO THE FORMER CLASS AND NONE ARE MADE TO THE LATTER. THIS CLASSIFICATION VIOLATES THE SOCIAL SECURITY ACT, 42 U.S.C. §§601, 608 AND THE SUPREMACY CLAUSE, U.S. CONST. ART. VI §2.

In enacting the Social Security Act of 1935, and more specifically the program entitled Aid to Families with Dependent Children (AFDC), 42 U.S.C. §§601 et. seq., Congress tried to insure that children will remain with their natural parents or, if this were not possible, then with relatives. S.Rep. No. 628, 75th Cong. 1935. The purpose of the Act is clearly declared:

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance . . . to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life. . . there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part.
> 42 U.S.C. §601 (Appendix F) (emphasis added.)

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It is axiomatic that a State system which does not encourage the care of dependent children in their own homes or in the homes of relatives violates the Social Security Act.

The full foster care subsidy of $105.00 is obviously far in excess of the approximately $60.00 per month AFDC received by a child living with a natural parent. Foster children also receive an additional clothing allowance and other benefits.

This necessarily has the effect of discouraging relatives from accepting related foster children, and to this

extent the Illinois scheme violates the Social Security Act. Foster parents who are related to their foster children are not spared any of the expense incurred by foster parents unrelated to their foster children. A foster child's needs are the same regardless whether he lives with a relative or a stranger. Moreover, the Appellees "may not assume that a [welfare] recipient's relatives, not legally responsible for his support, will charge less than other persons providing [similar care]." Marotti v. White, p.11 supra and other cases there cited.

Further the Social Security Act and numerous regulations promulgated purusant thereto require that federally shared funds be distributed on an objective and equitable basis. The Illinois system is discriminatory; even the Appellees admit this; and the District Court so found. See also Clampett v. Madigan, (CIV 73-4018 D. S. Dak. So. Div. 1973 supra).[3] And compare Townsend v. Swank, 404 US 282, 92 S. Ct. 502 (1971).

3] Acknowledgement is hereby made of the advice and assistance of Stephen L. Pevar, Esq., Mission, South Dakota (605/ 856-4444), counsel for Marie Clampett, et.al., on Part II of this Argument.

CONCLUSION

Appellants respectfully urge that the District Court erred and the decision below must be reversed because it violates the Equal Protection Clause and is inconsistent with the Social Security Act and the Supremacy Clause. The questions presented are of great public importance, and so substantial as to warrant consideration by the Court on full briefs and arguments.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARCEL YOUAKIM and LINDA YOUAKIM individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Plaintiffs,

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Defendants.

PATRICK A. KEENAN
ATTORNEY AT LAW
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MEMORANDUM OF DECISION

John Paul Stevens, Circuit Judge, and
Abraham L. Marovitz and Philip W. Tone, District Judges.

PHILIP W. TONE, District Judge.

This suit was commenced as a class action to enjoin the operation of the Illinois foster home program. Under that program foster parents who provide homes for children unrelated to them receive monthly foster care payments from the Department of Children and Family Services, but foster parents who provide homes for children related to them do not receive such payments. Because plaintiffs seek to enjoin the operation of a state statute, a three-judge court was convened pursuant to 28 U.S.C. §§ 2281, 2284. Defendants have now moved to strike and dismiss.

APPENDIX A (14 pages.)

The Illinois statutory scheme allocates federally subsidized payments to foster parents who care for children who are wards of the state. Section 5 of the Department of Children and Family Services Act, Ill. Rev. Stat., 1971, Ch. 23, § 5005, empowers the Department ("CFS") and its Director to

(a) establish rules and regulations concerning foster care;

(b) accept for care and placement in foster homes children adjudicated wards of the state; and

(c) make payments for the board, clothing, care, training and supervision of children placed in licensed foster homes.

Under the Department's eligibility criteria, eligibility for monthly payments, which now approximate $105 per child, depends upon the economic status of the home from which the child was removed, not on the wealth of the foster parents. By authorizing payments only to licensed homes, Section 5 denies eligibility to foster parents providing homes for children related to them, because those foster parents are exempt from licensing under the Child Care Act of 1969, Ill. Rev. Stat., 1971, Ch. 23, §§ 2212.05, 2212.17, and thus cannot be licensed.[1/]

1/ The parties have directed their arguments primarily to the Illinois Department of Children and Family Services Manual at 95-97 as the authority for denying payments to related foster parents. This manual, however, merely states that "[t]he Department has no statutory authority to pay relatives for the care of children," and thus does no more than summarize what is apparent on the face of the statutes. For the purposes of this opinion, then, Ill. Rev. Stat., 1971, Ch. 23, §§ 2212.05, 2212.17, and 5005 will be considered as the challenged statutes.

Foster parents caring for related children are eligible for Aid to Families with Dependent Children ("AFDC") payments under Ill. Rev. Stat., 1971, Ch. 23, §§ 4-1 to 4-11, but in order to receive these payments they must make a separate application to the Department of Public Aid, and more importantly, these monthly payments are only about $63.00 per child. In addition to the AFDC payments, some foster families in which the parents and children are related receive additional funds from the Social Service Administration up to the amount of the foster care payments, if the Department of Children and Family Services makes a determination of need. This exception to the general practice is explained only in the CFS placement manual, but according to an affidavit filed by an administrator of CFS, approximately 140 of the 1500 related foster families in the state now receive this extra allowance.

Plaintiffs are Marcel and Linda Youakim, husband and wife; Timothy and Mary Lou Robertson, the minor brother and sister of Linda Youakim who have been living with their foster parents the Youakims since 1972; and Larry and Sherry Robertson, the minor brother and sister of Linda Youakim who have been living in foster care facilities operated by persons unrelated to them since 1969. The Youakims allege that because they do not receive the full foster care payments, they suffer severe financial hardship in caring for Timothy and Mary Lou, and are financially unable to take in Larry and Sherry. On behalf of themselves and all other persons similarly situated, plaintiffs assert that the distinction between related and unrelated foster parents for the purpose of determining eligibility for foster

care benefits denies them equal protection of the laws as guaranteed by the Fourteenth Amendment, and they ask that defendants, the Illinois Department of Family Services and its director, be enjoined from enforcing, applying or executing this program.

Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, defendants have moved to strike and dismiss the complaint, asserting, in addition to an abstention ground which we do not reach, that

(1) the Court does not have jurisdiction over the subject matter;

(2) the action should not be maintained as a class action; and

(3) plaintiffs have failed to state a claim upon which relief may be granted.

Both sides having filed affidavits asserting facts outside the pleadings, we treat the motion as one for summary judgment, as we are authorized to do by the last sentence of Rule 12(b).

At the oral argument plaintiffs urged that an evidentiary hearing should be held. In the view we take of the case, if the evidence most favorable to plaintiffs' contentions is assumed, judgment must be entered for defendants. An evidentiary hearing is, therefore, unnecessary.

Jurisdiction.

Defendants argue that this Court lacks jurisdiction because the action is in effect against the State of Illinois and therefore is barred by the sovereign immunity provision of the Eleventh Amendment. This argument is without merit.

Beginning with Ex Parte Young, 209 U.S. 123 (1908), it has been held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the state and thus is not prohibited by the Eleventh Amendment. This rationale has been consistently followed in numerous civil rights cases and other actions where the application or execution of state statutes has been enjoined, cf. Townsend v. Swank, 404 U.S. 282 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969), and has been applied to permit suits against state officials to test the constitutionality of statutes under which they are acting, Hill v. Wallace, 259 U.S. 44 (1922); Hammer v. Dagenhart, 247 U.S. 251 (1918). Indeed, under this rationale courts have assumed jurisdiction over many recent suits against state officials brought for the purpose of attacking social welfare schemes similar to the one here in question. Cf., e.g., Gaither v. Sterett, 346 F. Supp. 1095 (N.D. Ind. 1972); Jefferies v. Sugarman, 345 F. Supp. 172 (S.D.N.Y. 1972); Dimery v. Department of Social Services, 344 F. Supp. 1181 (S.D. Iowa 1972); Alexander v. Swank, 314 F. Supp. 1082 (N.D. Ill. 1970). The Court has jurisdiction to decide this case.

Class Action Issue.

Another preliminary question is the propriety of maintaining this action as a class action. If the requirements of Rule 23, F. R. Civ. P., are met, a court normally must approve a class action. Fujishima v. Board of Education, 460 F. 2d 1355, 1360 (7th Cir. 1972); but see Ihrke v. Northern States Power Co., 459 F. 2d 566, 572 (8th Cir. 1972). Defendants argue that

the claims of the named plaintiffs are not typical because not all foster parents will be financially unable to care for children related to them if they do not receive payments from the state. This argument ignores the basis of plaintiffs' claims. Plaintiffs are not challenging a system where payments are made to some and denied to others on the basis of need, but a scheme whereby, irrespective of the individualized needs of the foster parents, payments are made to families where the foster parents and children are unrelated, but, as a general rule, not to related foster families. The exception to the general policy allows payments to related foster families in certain cases, but even in light of this, related foster parents as a class are treated differently than unrelated foster parents, because in order to qualify under this exception they must meet a certain level of need which the unrelated foster parents do not have to meet. Thus, the interests of the named plaintiffs are typical of the class and, the other requirements of Rule 23 also having been met, the class action will be approved.

Other Preliminary Matters.

Before proceeding to the merits, we must first dispose of several other matters. One of these is plaintiffs' motion to strike certain allegations of an affidavit in support of defendants' motion by Frank J. Kopecky, Chief Counsel for CFS. Plaintiffs first seek to strike reference to the exception to the scheme under attack whereby under certain circumstances related foster parents are given payments in an amount equal to those given to unrelated foster parents. This motion will

be denied, for plaintiffs have not presented adequate grounds to strike these allegations, and plaintiffs themselves have filed affidavits which refer to the same exception. Next, plaintiffs seek to strike an allegation in the affidavit which refers to an administrative determination as the basis for the Department's policy of generally not paying related foster parents. This allegation will be stricken because of the affiant's failure to state specific facts from which we can determine his personal knowledge of this matter. Finally, plaintiffs seek to strike statements relating to the respective jurisdictions of the Department of Public Aid and the Department of Children and Family Services. Plaintiffs' motion in this respect will be denied, the affiant being capable of testifying as to these matters from his own personal knowledge.

The Merits.

We turn now to the equal protection question. A state statute dealing with social welfare need only be rationally based and free from invidious discrimination. Dandridge v. Williams, 397 U.S. 471 (1970). Since the statutes challenged here fall within the category governed by the Dandridge rule, their validity depends upon whether the distinction between related and unrelated foster parents is based on differences that are reasonably related to the legitimate purposes of the foster care program. Morey v. Doud, 354 U.S. 457 (1953).

Plaintiffs argue that, by providing for state aid only to foster parents who are unrelated to the child and denying it to others, the state has breached its duty to provide equally for all dependent children and has in fact contributed to the breakup of family homes. They assert that since related foster parents have the same need for state

subsidies to provide adequately for their foster children as do unrelated foster parents, there is no basis for the distinction. Although this statement of the state's duty may indeed be correct, plaintiffs have failed to recognize both the purpose for which the payments are made and the test to be employed in examining the classification of the statute. When a classification in a law such as this is called into question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. Morey v. Doud, supra, 354 U.S. 457; Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

At the time this statute was enacted, the Illinois General Assembly could reasonably have been concerned about how to use available public funds to provide as many foster homes as possible. It could reasonably have set out to provide for allocation of the available funds in a manner designed to secure the maximum number of foster parents for children who would otherwise remain parentless. A reasonable method of achieving this goal would have been to provide for the distribution of funds only to persons who would otherwise have had no particular reason or incentive for becoming foster parents rather than allocating the funds to all persons who become foster parents and thereby reducing the amount received by each; and it is on this basis that the defendants assert the classification was made. Allegedly, the state perceived a moral obligation on behalf of related foster parents to care for their related children which could not or would not be deepened by providing them a pro

rata portion of the available funds. Therefore, according to the defendants, the state decided that the money which could have been allotted to related foster parents would be better used as added inducement to unrelated persons.

This classification, the wisdom of which is not for us to determine, bears a rational relationship to the legitimate purpose of attempting to assure that foster homes are made available. Some related foster parents may not be able to afford the responsibility of caring for additional children,[2/] but the state argues that the scheme was not enacted to alleviate this problem, and from the fact that payments are not based on the relative wealth of the foster parents, this contention is borne out. In this respect, the case at bar differs from United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973), a case in which the Supreme Court held unconstitutional a statutory scheme which excluded from participation in the food stamp program any household containing an individual who is unrelated to any other member of the household. The critical point of that decision, and the basis upon which it is distinguishable from the case at bar, is that the purpose of the food stamp program was to alleviate hunger and that to fulfill this purpose it had to be administered on the basis of need rather than on the basis of the relationships of the people constituting one economic unit and sharing cooking facilities.

2/ Of course, this possibility is lessened by the fact that AFDC payments are generally available.

More analogous to the case at bar is Ramos v. Montgomery, 313 F. Supp. 1179 (S.D. Cal. 1970), aff'd, 400 U.S. 1003 (1971), a case involving a challenge to a California scheme under which AFDC payments made to natural parents were substantially less than payments made to foster parents. The Court in that case recognized that maintenance of the family structure was an important consideration in any child welfare program and that some natural parents were financially unable to provide suitable homes for their children, but nevertheless upheld the classification on the ground that the overriding purpose of the statute was the overall interest of the public in the protection of children[3/] and that this purpose was reasonably served by a plan which was motivated to provide as many foster homes as possible.[4/]

3/ Among the stated purposes for which child welfare services are authorized under the Illinois Department of Children and Family Services Act are "protecting and caring for homeless dependent or neglected children"; "protecting and promoting the welfare of children, including the strengthening of their own families and counseling of family members"; and "providing adequate care of children away from their homes, where needed, in foster family homes." Ill. Rev. Stat., 1971, Ch. 23, § 5005. On the basis of this language, it can be inferred that, as in Ramos, although strengthening of the family unit is an important concern of the Act, the primary purpose of the Act is the protection and care of children generally.

4/ Another basis for the decision in Ramos was that it was reasonable to expect that foster parents would incur expenses in meeting state licensing requirements which natural parents would not. Whether this rationale is also applicable to the case at bar is difficult to determine, for although relatives are not subject to licensing, they are kept under close scrutiny by CFS. In any event, it is not necessary for us to resolve this question.

The Ramos case is factually distinguishable from the case at bar, but the reasoning of the court is applicable here. A natural parent's responsibility to its child may stem from a legal duty, whereas a related foster parent's duty is moral, but in either case the result will generally be the same: the parent or relative is likely to care for the child. It is thus reasonable in either case for the state to adopt a program designed to induce families who would not otherwise become foster parents to assume that role.

The challenged classification will cause some children to be separated from their relatives for financial reasons. The state may reasonably have concluded, however, that the greater good of the greater number of children in need of foster homes is served by the classification which has been made. It may have concluded that if the classification were not made, the state's foster homes program would be jeopardized. As the class eligible to receive payments is made more inclusive, the individual payments become smaller. The possibility exists that if related persons are added to the eligible class, the individual payments would be reduced to an amount insufficient to induce qualified unrelated persons to provide foster homes for dependent children. Thus, the purpose of the payments

would not be served, and either the fiscal integrity of the program would be impaired or the standards for approval of unrelated persons might have to be compromised.5/

There is language in Townsend v. Swank, supra, 404 U.S. at 291, that serious equal protections problems may arise when a state attempts to rely on the concept of fiscal integrity to limit beyond federal statutory standards the class eligible to receive federally subsidized payments, but plaintiffs' argument that that dictum invalidates the Illinois program in question here is of no avail. The regulations interpreting

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5/ A consideration of the consequences of eliminating the classification which plaintiffs challenge will identify another rational basis for it. The payments which are the subject of this litigation are intended to subsidize care for children who have been adjudicated wards of the state. It is manifest that there are many children in Illinois whose natural parents are deceased but who, without being adjudicated wards of the state, are cared for by relatives who are their legal custodians, guardians, or perhaps even adoptive parents. Certainly the state has an interest in encouraging its citizens to care for related minors who have been orphaned by the death of their parents, either by adopting them, accepting the responsibilities of guardianship, or even merely taking informal custody of such minor children without having them adjudicated wards of the state. If the plaintiffs' attack on the Illinois program were sustained, relatives would have a financial inducement to cause orphaned children to be adjudicated wards of the state in order to qualify themselves for foster care payments. The state may rationally conclude that such a financial motivation would contravene the policy of the laws relating to adoption and guardianship.

the Federal Social Security Act give the states "substantial latitude and corresponding responsibility for determining the coverage, nature, and scope of their public assistance programs," and limits this authority only to the extent that "the groups selected for inclusion in the plan ... must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act." 45 C.F.R. § 233.10. Far from being inconsistent with the federal scheme, the Illinois scheme in general seems to parallel it.[6/] The federal statute authorizes aid to the natural parents and relatives of dependent children in one section, 42 U.S.C. § 606, and aid to foster parents in another, 42 U.S.C. § 608. Additionally, more money is allocated under the federal plan to foster care payments than to regular ADFC payments. 42 U.S.C. § 603(a)(1)(B); see Ramos v. Montgomery, supra, 313 F. Supp. at 1182. Thus the federal statute makes the same classification as the Illinois statute.

6/ Plaintiffs argue that the "exception to policy" under which some related foster parents receive additional allotments on the basis of need makes the state scheme unlike the federal. This is a variation, which the federal regulations explicitly allow, 45 C.F.R. § 233.10, but the two schemes are nevertheless parallel.

The Illinois scheme does not deny plaintiffs equal protection of the laws. Summary judgment is entered in favor of defendants.

John Paul Stevens
Circuit Judge

Abraham Lincoln Marovitz
District Judge

Hubert L. Will
District Judge

Dated: February 28, 1974

APPENDIX B

Chapter 23 Illinois Revised Statutes

2212.03 Facility for child care, defined.] § 2.-03. "Facility for child care" or "child care facility" means any person, group of persons, agency, association or organization, whether established for gain or otherwise, who or which receives or arranges for care or placement of one or more children, unrelated to the operator of the facility, apart from the parents, with or without the transfer of the right of custody in any facility as defined in this Act, established and maintained for the care of children.

2212.17 Foster family home and types of homes, defined.] § 2.17. "Foster family home" means a facility for child care in residences of families who receive no more than 8 children unrelated to them, unless all the children are of common parentage, for the purpose of providing family care and training for the children on a full-time basis. The family's own children, under 18 years of age, shall be included in determining the maximum number of children served. The term "foster family home" includes homes receiving children from any State-operated institution for child care; or from any agency established by a municipality or other political subdivision of the State of Illinois authorized to provide care for children outside their own homes. The types of foster family homes are defined as follows:

(a) "Boarding home" means a foster family home which receives payment for regular full-time care of a child or children.

(b) "Free home" means a foster family home other than an adoptive home which does not receive payments for the care of a child or children.

(c) "Adoptive home" means a foster family home which receives a child or children for the purpose of adopting the child or children.

(d) "Work-wage home" means a foster family home which receives a child or children who pay part or all of their board by rendering some services to the family not prohibited by the Child Labor Law 1 or by standards or regulations of the Department prescribed under this Act. The child or children may receive a wage in connection with the services rendered the foster family.

(e) "Agency-supervised home" means a foster family home under the direct and regular supervision of a licensed child welfare agency, of the Department of Children and Family Services, of a circuit court, or of any other State agency which has authority to place children in child care facilities, and which receives no more than 8 children, unless of common parentage, who are placed and are regularly supervised by one of the specified agencies.

(f) "Independent home" means a foster family home, other than an adoptive home, which receives no more than 4 children, unless of common parentage, directly from parents, or other legally responsible persons, by independent arrangement and which is not subject to direct and regular supervision of a specified agency except as such supervision pertains to licensing by the Department.

1 Chapter 48, § 31.1 et seq.

APPENDIX C

Chapter 23 Illinois Revised Statutes

§ 5001. Purpose

The purpose of this Act is to create a Department of Children and Family Services to provide social services to children and their families, to operate children's institutions, and to provide certain other rehabilitative and residential services as enumerated in this Act. 1963, June 4, Laws 1963, p. 1061, § 1.

5005. Direct child welfare services.] § 5. To provide direct child welfare services when not available through other public or private child care or program facilities.

For purposes of this Section:

The term "children" means persons found within the State who are under the age of 18 years at the time of acceptance for service or care. The term also includes children under age 18 and children age 18 or more but under age 21 who (1) are in foster care under order of a court and (2) were, at any time before August 1, 1969, recipients of foster care under Sections 6-4 or 12-8.6 of "The Illinois Public Aid Code", approved April 11, 1967, as amended.1

The term "child welfare services" means public social services which supplement or substitute for parental care and supervision for the purpose of: (1) preventing or remedying or assisting in the solution of problems which may result in the neglect, abuse or exploitation of children; (2) protecting and caring for homeless, dependent or neglected children; (3) protecting and promoting the welfare of children, including the strengthening of their own families and counseling of family members; (4) providing adequate care of children away from their homes, where needed, in foster family homes or day care or other child care facilities; or (5) providing counseling for mentally retarded, physically, and socially handicapped children and their parents when not otherwise available.

The Department shall establish and maintain tax-supported child welfare services and extend and seek to improve voluntary services throughout the State, to the end that services and care shall be available on an equal basis throughout the State to children requiring such services.

For the purpose of insuring effective state-wide planning, development, and utilization of resources for the day care of children, operated under various auspices, the Department is hereby designated to coordinate all day care activities for children of the State and shall:

(1) Develop a comprehensive day-care plan for the State which identifies high-priority areas and groups, relating them to available resources, and identifying the most effective approaches to the use of existing day care services. The plan shall include methods and procedures for the development of additional day care resources for children to meet the goal of reducing short-run and long-run dependency and to provide necessary enrichment and stimulation to the education of young children. Recommendation shall be made for State policy on optimum use of private and public, local, state and federal resources. A written plan shall be submitted to the Governor, annually, on January 1, and shall include an evaluation of developments over the preceding year, including cost-benefit analyses of various arrangements.

(2) The Department shall conduct day care planning activities within the following priorities:

(a) development of voluntary day care resources wherever possible, with the provision for grants-in-aid only where demonstrated to be useful and necessary as incentives or supports;

(b) emphasis on service to children of recipients of public assistance where such service will allow training or employment of the parent toward achieving the goal of independence;

(c) maximum employment of recipients of public assistance in day care centers and day care homes, operated in conjunction with short-term work training programs;

(d) care of children from families in stress and crises whose members potentially may become, or are in danger of becoming, non-productive and dependent;

(e) expansion of family day care facilities wherever possible;

(f) location of centers in economically depressed neighborhoods, preferably in multi-service centers with cooperation of other agencies;

(g) use of existing facilities free of charge or for reasonable rental wherever possible in lieu of construction.

(3) Based on its planning activities, the Department shall actively stimulate the development of public and private resources at the local level. It shall also seek the fullest utilization of federal funds directly or indirectly available to the Department.

(4) Where appropriate, existing non-governmental agencies or associations shall be involved in planning by the Department.

The Department shall establish rules and regulations concerning its operation of programs established to meet these purposes, including but not limited to adoption, foster care, family counseling, protective services, service to unwed mothers, homemaker service, return of runaway children, and interstate services.

The Department may provide financial assistance, and shall establish rules and regulations concerning such assistance, to persons who adopt physically or mentally handicapped, older and other hard-to-place children who immediately prior to their adoption were legal wards of the Department. The amount of assistance may vary, depending upon the needs of the child and the adoptive parents, but must be less than the monthly cost of care of the child in a foster home. Special purpose grants are allowed where the child requires special service but such costs may not exceed the amounts which similar services would cost the Department if it were to provide or secure them as guardian of the child.

The Department shall accept for care and training any child who has been adjudicated neglected or dependent committed to it pursuant to the "Juvenile Court Act".2 The Department may, at its discretion except for those children also adjudicated neglected or dependent, accept for care and training any child who has been adjudicated delinquent or as a minor in need of supervision, under the "Juvenile Court Act", but no such child

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shall be committed to the Department by any court without the approval of the Department.

The Department may assume temporary custody of any child (1) if it has received a written consent to such temporary custody signed by the parents of the child or by the parent having custody of the child if the parents are not living together or by the guardian or custodian of the child if the child is not in the custody of either parent or (2) if the child is found in the State and neither a parent, guardian nor custodian of the child can be located. The Department shall have the authority, responsibilities and duties that a legal custodian of the child would have pursuant to Section 1-13 of the "Juvenile Court Act".[3] A parent, guardian or custodian of a child in the temporary custody of the Department who would have custody of the child if he were not in the temporary custody of the Department may deliver to the Department a signed request that the Department surrender the temporary custody of the child. The Department may retain temporary custody of the child for 10 days after the receipt of the request, during which period the Department may cause to be filed a petition pursuant to the "Juvenile Court Act". If a petition is so filed, the Department shall retain temporary custody of the child until the court orders otherwise. If a petition is not filed within the 10 day period, the child shall be surrendered to the custody of the requesting parent, guardian or custodian not later than the expiration of the 10 day period, at which time the authority and duties of the Department with respect to the temporary custody of the child shall terminate. The Department may place children under 18 years of age in licensed child care facilities when in the opinion of the Department, such placement would be for their best interest. Payment for board, clothing, care, training and supervision of any child placed in a licensed child care facility may be made by the Department, by the parents or guardians of the estates of those children, or by both the Department and the parents or guardians, except that no payments shall be made by the Department for any child placed in a licensed child care facility for board, clothing, care, training and supervision of such a child that exceed the average percapita cost of maintaining and of caring for a child in institutions for dependent or neglected children operated by the Department. However, such restriction on payments does not apply in cases where children require specialized care and treatment for problems of severe emotional disturbance, physical disability, social adjustment, or any combination thereof and suitable facilities for the placement of such children are not available at payment rates within the limitations set forth in this Section.

The Department may receive and shall use, in its entirety, for the benefit of children any gift, donation or bequest of money or other property which is received on behalf of such children, or any financial benefits to which such children are or may become entitled while under the jurisdiction or care of the Department.

Amended by P.A. 76-2041, § 1, eff. July 1, 1970; P.A. 77-1374, § 1, eff. Aug. 31, 1971.

[1] Chapter 23, §§ 6-4, 12-13.6.
[2] Chapter 37, § 701-1 et seq.
[3] Chapter 37, § 701-12.

APPENDIX D

Chapter 23, Illinois Revised Statutes

§ 2—11. "Legally Responsible Relative"

"Legally Responsible Relative": the spouse of an applicant or recipient; the parent or parents of a child who is under age 21; and the parent or parents of a child who is age 21 or over and blind or permanently and totally disabled and (1) has been continuously dependent, in whole or in part, upon one or both of his parents, and (2) has continuously resided in the home of a parent except for temporary absences for medical care or rehabilitative training.

The support obligation of other persons defined as "legally responsible relatives" in this Section prior to the effective date of this Amendatory Act of 1967, for aid extended to their dependents prior to such effective date, shall remain unimpaired. 1967, April 11, Laws 1967, p. 122, § 2-11; 1967, Aug. 1, Laws 1967, p. —, S.B. No. 1151, § 1.

Chapter Three
SPECIAL CHILD CARE PROGRAMS

Part Five: PLACEMENT WITH RELATIVES

I. DEFINITION

"Relative" means a person having any of the following relationships to the child by blood, marriage, or adoption: grandparents, brother, sister, stepbrother, stepsister, uncle or aunt. By administrative interpretation the definition has been broadened to include great-uncle, great-aunt and great-grandparent. Such "related" persons are not subject to foster home licensing whereas all other "relative" homes are subject to study and licensing as a foster family home.

II. LEGAL BASE

The Act Creating the Department of Children and Family Services authorizes provision of child welfare services which supplement or substitute parental care.

Provision of such services does not preclude placement of a child under care with approved relatives.

III. SCOPE OF SERVICE

The primary consideration in placement of a child with relatives are the needs of the child. Such placement, if indicated, is designed to reinforce the child's identification with "family."

IV. CRITERIA

If a relative home is to be considered as a placement resource the home must reasonably meet the minimum standards cited in Chapter Two, Section IV. Relative resources should be explored for all children for whom placement is indicated with the exception of children relinquished for adoption.

V. INTAKE

A. Request For Service

(1) The district office should check with the Illinois Department of Public Aid as a potential financial resource for the child(ren) living with relatives at the time of referral or for whom relatives are interested in accepting for care.

Part Five
SPECIAL CHILD CARE PROGRAMS

(2) Form CFS-602, Medical Report on An Adult or Child in a Licensed Child Care Facility, must be completed for all members of the household if a relative home is being considered as a placement resource.

B. Evaluation

Interest and concern of relatives in the child(ren); the feeling of relatives toward parents; ability to cooperate with the Department; and, placement of choice of the parents and child(ren) must all be explored as essential elements for a successful placement.

C. Disposition

In all relative placements the district office should approach the court seeking a court order appointing the Guardianship Administrator or the approved relative as guardian of the person of the child(ren) to insure the availability of a person to make decisions in behalf of the child(ren) and to prevent removal of the child(ren) by unauthorized persons.

VI. PROCEDURES FOLLOWING CASE ACCEPTANCE

A. The District Office will:

(1) Arrange for placement and authorize payment, if indicated and approved by Social Service Administrator, Metropolitan or Downstate Area.

(2) Supervise placement and provide casework services to the family or relatives on behalf of the child(ren).

B. The Relatives will:

(1) Accept terms of placement such as duration and agency goals for the child(ren) and work cooperatively with the agency to achieve these goals.

(2) Respect the parents desires for religious training for the child(ren).

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1. PLACEMENT WITH RELATIVES

A. The Department has no statutory authority to pay relatives for the care of children. Only the Social Service Administrator of Metropolitan or Downstate Area may authorize such payment and it will not be authorized without written approval. A request for payment of a relative shall include: summary of the child's situation; legal status; reason for considering the proposed placement as desirable for the child; other plans tried or considered; financial circumstances of the relatives; and, monthly rate for which approval is requested.

B. If payment is to be made it shall be an inclusive rate which does not exceed the regular rates paid to Division of Child Welfare foster family homes.

C. Monthly payment to relatives is authorized by directing completed Form CFS-903, Payment Authorization, to the State Administrative Office, Springfield, 62706. Indicate in Section 4, Type of Payment #34 Relative - "legally exempt from licensing." Monthly amount to be entered in Section 5 Payments - Board. (See Chapter Two, Appendix 1, II A - Monthly Payment Rate.)

D. Initial placement clothing may be authorized by use of Forms CFS-932, Purchase Authorization, and FA-13, Invoice-Voucher. The vendor(s) should direct the completed forms to the State Administrative Office, Springfield, 62706, for payment. (See Chapter Two, Appendix 1, II B - Initial Clothing Allowance.)

E. Form CFS-425, Foster Home Placement Agreement, is to be signed in duplicate by the relative payee and the district worker with changes to indicate the relationship of the caretaker(s) to the child. One copy is kept by the relative and the other filed in the child's record.

APPENDIX F

Title 42 United States Code

§ 601. Appropriations

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

Aug. 14, 1935, c. 531, Title IV, § 401, 49 Stat. 627; 1946 Reorg.Plan No. 2, § 4, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1095; 1953 Reorg. Plan No. 1, §§ 5, 8, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631; Aug. 1, 1956, c. 836, Title III, § 312(a), 70 Stat. 848; July 25, 1962, Pub.L. 87-543, Title I, § 104(a) (4), (c) (2), 76 Stat. 185, 186; Jan. 2, 1968, Pub.L. 90-248, Title II, § 241(b) (1), 81 Stat. 916.

APPENDIX G

Title 42 United States Code

§ 608. Payment to States for foster home care of dependent children; definitions

Effective for the period beginning May 1, 1961—

(a) the term "dependent child" shall, notwithstanding section 606(a) of this title, also include a child (1) who would meet the requirements of such section 606(a) or of section 607 of this title except for his removal after April 30, 1961, from the home of a relative (specified in such section 606(a)) as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child, (2) whose placement and care are the responsibility of (A) the State or local agency administering the State plan approved under section 602 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of such State plan has made an agreement which is still in effect and which includes provision for assuring development of a plan, satisfactory to such State agency, for such child as provided in paragraph (f) (1) and such other provisions as may be necessary to assure accomplishment of the objectives of the State plan approved under section 602 of this title, (3) who has been placed in a foster family home or child-care institution as a result of such determination, and (4) who (A) received aid under such State plan in or for the month in which court proceedings leading to such determination were initiated, or (B) (i) would have received such aid in or for such month if application had been made therefor, or (ii) in the case of a child who had been living with a relative specified in section 606(a) of this title within 6 months prior to the month in which such proceedings were initiated, would have received such aid in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made therefor;

(b) the term "aid to families with dependent children" shall, notwithstanding section 606(b) of this title, include also foster care in behalf of a child described in paragraph (a) of this section—

(1) in the foster family home of any individual, whether the payment therefor is made to such individual or to a public or nonprofit private child-placement or child-care agency, or

(2) in a child-care institution, whether the payment therefor is made to such institution or to a public or nonprofit private child-placement or child-care agency, but subject to limitations prescribed by the Secretary with a view to including as "aid to families with dependent children" in the case of such foster care in such institutions only those items which are included in such term in the case of foster care in the foster family home of an individual.

(c) the number of individuals counted under clause (A) of section 603(a) (1) of this title for any month shall include individuals (not otherwise included under such clause) with respect to whom expenditures were made in such month as aid to families with dependent children in the form of foster care; and

(d) services described in paragraph (f) (2) of this section shall be considered as part of the administration of the State plan for purposes of section 603(a) (3) of this title;

but only with respect to a State whose State plan approved under section 602 of this title—

(e) includes aid for any child described in paragraph (a) of this section, and

(f) includes provision for (1) development of a plan for each such child (including periodic review of the necessity for the child's being in a foster family home or child-care institution) to assure that he receives proper care and that services are provided which are designed to improve the conditions in the home from which he was removed or to otherwise make possible his being placed in the home of a relative specified in section 606(a) of this title, and (2) use by the State or local agency administering the State plan, to the maximum extent practicable, in placing such a child in a foster family home or child-care institution, of the services of employees, of the State public-welfare agency referred to in section 722(a) of this title (relating to allotments to States for child welfare services under sections 721–728 of this title) or of any local agency participating in the administration of the plan referred to in such section, who perform functions in the administration of such plan.

For purposes of this section, the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing; and the term "child-care institution" means a nonprofit private child-care institution which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing.

Aug. 14, 1935, c. 531, Title IV, § 408, as added May 8, 1961, Pub.L. 87-31, § 2, 75 Stat. 75, and amended July 25, 1962, Pub.L. 87-543, Title I, §§ 101(b) (2) (D), 104(a) (3) (F), (G), 131(b), 135(a)–(d), 155(a), 76 Stat. 180, 185, 193, 196, 197, 207; Jan. 2, 1968, Pub.L. 90-248, Title II, §§ 201(e) (4), 205(c), 81 Stat. 880, 892.

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APPENDIX

Supreme Court of the United States

OCTOBER TERM 1974

No. 73-6935

MARCEL YOUAKIM ET. AL.,

Appellants

—*v.*—

JEROME MILLER, ET. AL.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT FILED JUNE 22, 1974
PROBABLE JURISDICTION NOTED MARCH 17, 1975

Supreme Court of the United States

OCTOBER TERM 1974

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Citation to Decision Below

The Decision of the Three-Judge District Court for the Northern District of Illinois, Eastern Division, from which this appeal is taken is reported at 374 F. Supp. 1204, and is reproduced below in this Appendix.

Structural List of Relevant Docket Entries

1/21/74	Filed Stipulation (to file Second Amended Complaint).
1/21/74	Filed Plaintiffs' Second Amended Complaint Verified for injunctive relief
1/21/74	Pursuant to Stipulation, leave is granted to file second amended complaint verified for injunctive relief. Tone, J.
4/ 2/73	Filed Defendants' notice of filing motion with Motion to Strike and Dismiss Complaint. (To stand as to Second Amended Complaint.)
4/16/73	Filed Plaintiffs' Motion to Convene Three-Judge District Court.
5/25/73	Filed Order Designating the Honorable John Paul Stevens, Circuit Judge, Honorable Abraham L. Marovitz, District Judge and Honorable Philip W. Tone, District Judge to serve as members of a Three Judge Court.
1/ 8/74	Filed Defendants' Amended Memorandum of Law in Support of Motion to Strike and Dismiss. (Affidavits of Frank Kopecky and Ralph Hanebutt in Support of Defendants' Motion to Dismiss or Alternatively for Summary Judgment attached to Memorandum.)
1/24/74	Filed Plaintiffs' Motion to Strike certain portions of Affidavit of Frank Kopecky filed January 8, 1974 in support of Defendants' Motion to Dismiss or Alternatively for Summary Judgment, and two copies.

RELEVANT DOCKET ENTRIES (Continued)

1/24/74	Filed Affidavit of Everett McLeary in opposition to Defendants' Motion to Dismiss or Alternatively for Summary Judgment, and two copies.
1/25/74	Hearing on Defendants' Motion to Dismiss held before Three-Judge Court. Motion taken under advisement. Tone, J.
2/28/74	Enter Memorandum of Decision (draft) Tone, J.
4/23/74	Filed Notice of Filing; Plaintiffs' Notice of Appeal to the Supreme Court of the United States. pd/ $5.00
6/ 5/74	Filed Plaintiffs' Notice of Filing.
6/ 5/74	Filed Plaintiffs' request to certify and transmit records to the United States Supreme Court with Stipulation attached.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No 73 C 635

[Filed January 21, 1974]

MARCEL AND LINDA YOUAKIM, ET. AL., PLAINTIFFS

—vs—

JEROME MILLER, ET. AL., DEFENDANTS

STIPULATION (TO FILE SECOND AMENDED COMPLAINT)

It is hereby stipulated by and as between the parties, by their respective counsel that:

1. Pages 95-97 of the Illinois Department of Children and Family Services Placement Manual contains regulations which are germane to this case.

2. The Verified Complaint is amended to add the above regulations to the allegations of paragraphs 1, 4, 10(G), and 55(E).

3. Except for the changes set out in (2) above, the Second Amended Complaint is identical to the one now before the court.

4. If leave of Court is granted to file the Second Amended Complaint, Defendants will not object.

5. All of the pleadings, briefs and arguments heretofore addressed to the Verified Complaint shall stand as to the Second Amended Complaint.

Respectfully submitted,

/s/ Richard L. Ryan
RICHARD L. RYAN
Special Assistant
Attorney
General, Illinois
One of the Attorneys
for Defendant

/s/ Patrick A. Keenan
PATRICK A. KEENAN
DePaul Law Clinic
Attorney for Plaintiffs

[Title Omitted in Printing]

NOTICE OF FILING SECOND AMENDED COMPLAINT VERIFIED

[Filed Jan. 18, 1974]

[Caption Omitted in Printing]

TO: William J. Scott
Attorney General of Illinois

PLEASE TAKE NOTICE that on the 18th day of January, 1974, we filed the attached SECOND AMENDED COMPLAINT VERIFIED, RESPONSE TO DEFENDANTS' AMENDED MEMORANDUM OF LAW OF JANUARY 8, 1974, IN SUPPORT OF MOTION TO STRIKE AND DISMISS and STIPULATION with the clerk of the United States District Court for the Northern District of Illinois, Eastern Division, of the United States Courthouse, 219 South Dearborn Street, Chicago, Illinois.

/s/ Patrick A. Keenan
DePaul Law Clinic
Attorney for Plaintiffs

[Proof of Service Omitted]

SECOND AMENDED COMPLAINT VERIFIED FOR INJUNCTIVE RELIEF

[Filed January 21, 1974]

Civil Action No. 73-635—Three Judge Court

[Caption Omitted in Printing]

PRELIMINARY STATEMENT

1. This is a civil rights class action wherein Plaintiffs seek a permanent injunction barring the State Director of the Illinois Department of Children and Family Services and his successors, employees, or agents, and all other persons in active concert and participation, from enforcing, applying, or executing Illinois Revised Statutes, Ch. 23, §§ 2212.05 and 2212.17 (1971) and Illinois Department of Children and Family Services Placement Manual, Ch. 3, § 5 at 95 through 97 (1972) as written, because said statutes and regulations violate equal protection of the law as guaranteed the Plaintiffs by the 14th Amendment to the United States Constitution. Said statutes and regulations authorize federally-subsidized foster care payments for foster parents who are unrelated to their foster children but deny said payments to Plaintiffs, who are foster parents of minor wards of the State—foster children—related to them.

JURISDICTION

2. Jurisdiction is conferred on this Court by 28 U.S.C. § 1343(3), (4) which provide for original jurisdiction of this Court in all suits authorized by 42 U.S.C. § 1983 to redress the deprivation under color of State law of any right, privilege or immunity secured by the Constitution of the United States.

3. This suit concerns the denial by Defendants of equal protection of the law as guaranteed the Plaintiffs by the Fourteenth Amendment to the United States Constitution.

THREE-JUDGE COURT

4. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. § 2281, 2284 since Plaintiffs seek an injunction to restrain the Defendant, who is a state officer, from the enforcement, application and execution of State statutes (Ill. Rev. Stats., Ch. 23 §§ 2212.05, 2212.17) and regulations (Illinois, Department of Children and Family Services Placement Manual, Ch. 3, § 5 at 95 through 97), of statewide applicability on the grounds that said statutes and regulations are in violation of the Constitution of the United States.

PLAINTIFFS

5. Plaintiffs, Marcel Youakim and Linda R. Youakim, husband and wife, are citizens of the United States and have been residing in Des Plaines, Cook County, Illinois, since 1970. They are and have been the foster parents of Linda Youakim's brother, Timothy Robertson since January 7, 1972, and of her sister, Mary Lou Robertson since May 20, 1972. Plaintiff Marcel Youakim is related to Timothy and Mary Lou only by marriage.

6. Plaintiff, Timothy Robertson, is a minor citizen of the United States and has been living with his foster parents, Marcel and Linda Youakim in Des Plaines, Cook County, Illinois, since 1972. He is eight years old and a ward of the State of Illinois.

7. Plaintiff, Mary Lou Robertson, is a minor citizen of the United States and has been living with her foster parents, Marcel and Linda Youakim in Des Plaines, Cook County, Illinois, since 1972. She is ten years old and a ward of the State of Illinois.

8. Plaintiff, Larry Robertson, is a minor citizen of the United States and is and has been living in foster care facilities in the State of Illinois since May, 1969. He is thirteen years old and a ward of the State of Illinois. He does not now live with any other members of his family.

9. Plaintiff, Sherry Robertson, is a minor citizen of the United States and is and has been living in foster care facilities in the State of Illinois since May, 1969.

She is fifteen years old and a ward of the State of Illinois. She does not now live with any other members of her family.

STATUTES AND REGULATIONS CHALLENGED

10a. Illinois law generally provides for payments to foster parents who care for children who are wards of the State. The homes of such foster parents are defined by statutes which state in relevant part:

> "Facility for child care" or "child care facility" means any person, . . . who or which receives or arranges for care of placement of one or more children, *unrelated* to the operator of the facility. Dept. of Children and Family Services. Ill. Rev. Stats., Ch. 23, § 2212.05 (1971)
>
> and
>
> "Foster family home" means a facility for child care in residences of families who receive no more than 8 children *unrelated* to them, ...
> Ch. 23, § 2212.17 (emphasis added) (Entire texts set out in Appendix A.)

The statutory scheme does not provide for payments to foster parents caring for minor wards of the State who are related to them.

10b. Regulations of the Illinois Department of Children and Family Services provide for payments to foster parents who care for children unrelated to them who are wards of the State. The regulatory scheme does not provide for foster parents caring for minor wards of the State who are related to them. The policy of non-payment to foster parents caring for children related to them states in relevant part:

> The Department has no statutory authority to pay relatives for care of children. Ill. DCFS Placement Manual, Ch. 3 § 5 at 97 (Entire text set out in Appendix F.)

The regulations however provide that payments may be made to foster parents caring for children related to

them at an amount equal to those made to foster parents caring for children unrelated to them, as an exception to policy. (See Appendix F)

DEFENDANTS

11. Defendants, Jerome Miller, is the director of the Department of Children and Family Services. As such, he is the state official responsible for administering the Department of Children and Family Services Act which contains the challenged statutes and authorizes the challenged regulations, and for supervising the day-to-day operation of said Department.

12. Defendant Illinois Department of Children and Family Services acting pursuant to State law, and its Director, Jerome Miller, perform the following functions, inter alia:

a) established rules and regulations concerning . . . foster care;
b) accept for care and placement in foster homes children adjudicated wards of the state;
c) inspect and license foster homes;
d) authorize payment to foster parents caring for children unrelated to them.
Ill. Rev. Stats., 1971, ¶ 23 § 5005(4) (Statutes set out more fully in Appendix B.)

CLASS ACTION

13. The named Plaintiffs bring this action on their own behalf and, pursuant to Rule 23(a), (b)(2) of the Federal Rules of Civil Procedure, on behalf of all other persons similarly situated. The members of the class similarly situated are:

(i) all persons who maintain foster children related to them in their home and are refused full foster care payments because of said statutes and regulations.
(ii) all wards of the State (foster children) placed in the homes of foster parents to whom they

are related and who are denied payments because of said statutes and regulations.
(iii) all wards of the State (foster children) unable to live with their relatives who cannot afford to accept them as foster children without full State subsidy—the same State subsidy as they receive while placed with non-relatives.

The requirements of Rule 23 are met in that: the class is so numerous that joinder of all members is unpracticable; there are questions of law and fact common to the class; the claims of the representative party are typical of the claims of the class; the representative party will fairly and adequately protect the interests of the class; and the party opposing the class has acted on grounds generally applicable to the class, thereby making appropriate injunctive relief with respect to the class as a whole.

FACTS

14. Plaintiffs Timothy, Mary Lou, Larry and Sherry Robertson, were made wards of the State of lIlinois in May, 1969; and categorized by State officials to be foster children.

15. As a result of the classification of the children as foster children, they have been and are now placed in various State approved foster homes and foster care institutions.

16. Each of the State approved homes and foster care institutions receives foster care payments for caring for said children, except that Plaintiffs Youakim do not receive State foster payments.

17. On or about January 7, 1972, the home of Plaintiffs Marcel and Linda Youakim was approved by the Defendants as a proper placement facility, and said Plaintiffs, related foster parents, accepted for foster care, Plaintiff Timothy Robertson.

18. In the progress of getting their home licensed as a State-approved foster care facility, Plaintiffs, related foster parents asked a social worker employed by Defendants Miller and the Illinois Department of Children and Family Services at the Defendants' offices at

4320 West Montrose, Chicago, Illinois, whether they would receive regular foster care payments.

19. The social worker at that time told Plaintiffs they would not receive the regular foster care payments because the law and policy denies these payments to related foster parents. Upon consultation with their counsel, Plaintiffs believe the foregoing to be an accurate statement of the Illinois law and policy.

20. Notwithstanding Defendants' refusal to grant the regular foster care payments to Plaintiffs, Defendants tendered, and Plaintiffs on January 7, 1972 entered into, a form "Home Placement Agreement," and accepted Timothy for foster care. A copy of this agreement is attached hereto and made part hereof (Exhibit I). The agreement was signed by all parties.

21. Said Home Placement Agreement is identical to that used by Defendants in approving and subsidizing approved foster homes, except as follows:

(i) The paragraph which provides that foster parents will be subsidized has been crossed out.
(ii) The word "foster" has been crossed out in thirteen places.
(iii) The word "relatives" is inserted in two places. (See Exhibit I).

22. On or about May 20, 1972 Plaintiff, minor ward of the State, Mary Lou Robertson, was similarly accepted for foster care by Plaintiffs Marcel and Linda Youakim, related foster parents.

23. Plaintiff related foster parents are informed and believe that their foster daughter, Plaintiff Mary Lou Robertson, has been removed from several foster homes during the past three years, and further, that Mary Lou is considered to have a "behavior problem" which is the cause of frequent moves.

24. It is Plaintiffs' opinion that Mary Lou does not have a behavior problem when living with them, and that she is happy and well-adjusted in their home.

25. Plaintiff related foster parents are informed and believe that they are providing their foster son Timothy

with foster care of a quality equal to or better than the care he has received and would receive from foster parents unrelated to him. The basis for the information and the grounds for this belief are set out in the paragraphs following.

25(a) Plaintiff Timothy has difficulty breathing.

25(b) Prior to Timothy's placement with his present foster parents, Timothy said he had not received regular medical care for his condition.

25(c) Plaintiffs Marcel and Linda Youakim have, at great out-of-pocket expense, arranged for necessary medical care including the removal of Timothy's tonsils and adenoids.

25(d) Timothy's placement with Plaintiffs Youakim as his foster parents is *prima facie* the best placement for him because the guardian, Defendant Miller, has the legal duty to provide foster home placement that is in the best interests of the foster child. Presumably, the present placement is the best one available.

26. Plaintiffs are informed and believe that they are providing their foster daughter, Mary Lou with foster care of a quality equal to or better than the care she has received and would receive from foster parents unrelated to her. The basis for the information and the grounds for this belief are set out in the following paragraphs:

26(a) Mary Lou's teeth are not straight.

26(b) Prior to Mary Lou's placement with her present foster parents, Mary Lou said she had not received any dental or orthodontic care for her condition.

26(c) Plaintiffs Marcel and Linda Youakim have arranged several trips to an orthodontist for necessary dental care.

26(d) Mary Lou's placement with Plaintiffs Youakim as her foster parents is *prima facie* the best placement for her because the guardian, Defendant Miller, has the legal duty to provide foster home placement that is in the best interests of the foster child. Presumably, the present placement is the best one available.

27. Based on the above allegations, Plaintiffs believe it is in the best interests of Timothy and Mary Lou to live with them since, because they are related to their

foster children, they are extraordinarily interested in their welfare, and determined to provide them the best quality care possible.

28. Because of Defendants' refusal to provide regular foster care payments, Plaintiff related foster parents have incurred substantially greater personal expense in caring for the foster children then similarly situated unrelated foster parents who receive the regular payments.

29. The amount of said expense borne by Plaintiff related foster parents has become so great that Plaintiffs are informed and believe and fear that they will be unable to continue providing foster care for the foster children unless Defendants grant payments in the amount equal to that paid to unrelated foster parents.

30. The refusal of Defendants to provide regular foster care payments to Plaintiff related foster parents has precluded Plaintiffs Youakim from even considering accepting for foster care the other family members, Plaintiff Larry Robertson (age 13) and Plaintiff Sherry Robertson (age 15), both wards of the State presently residing in other foster care facilities.

30(a) Sherry is presently placed with unrelated foster parents.

30(b) Larry is presently placed in an orphanage.

31. Plaintiff related foster parents are informed and believe that the best interest of all four children would be served if they could all live together in a family setting. Defendants' refusal to grant Plaintiffs foster care payments makes this impossible.

32. To partially reduce the burden of the cost of caring for the foster children, Plaintiffs Marcel and Linda Youakim have, on the advice of a social worker employed by Defendants, applied for and do now receive some child support from the Cook County Department of Public Aid. The amount of said welfare payments is about $123.04 per month for two foster children and is substantially less than the amount of regular foster care payments, about $210.00 per month, they would receive but for being relatives.

33. The named Plaintiffs are informed and believe that:

33(a) Other members of the class are unaware of, or unable to procure the partial Public Aid subsidy; and do not now receive it;

33(b) The procedure for procuring a partial welfare subsidy is far more complex, burdensome, time consuming, and uncertain than the simple and regular foster care payment plan normally used by Defendants for unrelated foster homes.

33(c) All applications to, and all receipt of welfare payments from, the Cook County Department of Public Aid have a certain stigmatizing effect on the applicant/recipient, and this serves as a further deterrent to and thus discrimination against acceptance of related wards of the State for foster care. Plaintiffs Marcel and Linda Youakim would greatly prefer to receive full foster care payments from the Defendants rather than lesser welfare payments from the Department of Public Aid. Since they must seek and accept welfare payments to continue caring for Timothy and Mary Lou, Plaintiffs feel embarrassed and stigmatized in addition to being damaged by the difference in the amount.

33(d) Any difference in payment is damaging and discriminatory, and deters potentially qualified foster parents from accepting for foster care wards of the State related to them.

34. On information and belief, part or all of the funding for the Illinois Department of Children and Family Services and its foster care subsidy operators originate with the Federal Government. (Cf. Social Security Act, Subchapter 4, 42 U.S.C. § 601 et seq. esp. § 625 and generally, Federal Child Welfare and Revenue Sharing Laws).

35. It is the policy of the United States to encourage the care of children in their own homes or the homes of relatives whenever possible. 42 U.S.C. 601. (Complete text set out in Appendix C).

36. Plaintiffs are informed and believe that nothing in the Federal law or regulations concerning foster care payments, bars said payments to related foster parents. 42 U.S.C. 608 (Complete text set out in Appendix E).

37. It is the declared policy of the State of Illinois to administer all its laws in the best interests of the children of the State and to protect and promote the welfare of the children, including the strengthening of their own families wherever possible. Juvenile Court Act, Ill. Rev. Stats., 1971 Ch. 37 § 701 et seq; Department of Children and Family Services Act, Ill. Rev. Stats., 1971, Ch. 23 § 5001 et seq., esp. § 5005. (Appendices D and B).

38. Defendants' denial of the foster care payments to related foster parents conflict with the policy of the United States and the State of Illinois set out in paragraphs 32 through 34 above.

FIRST CAUSE OF ACTION

39. Plaintiffs reallege and incorporate by reference paragraphs 1 through 38 above.

40. Defendants, relying upon the statutes and regulations set out in paragraphs 10(a) and 10(b), *supra*, refuse to grant foster care payments to all persons, including Plaintiffs, who meet all State standards for foster homes, but who accept for foster care, or might accept for foster care, children—wards of the State—who are related to them.

41. Defendants, by granting foster care payments to qualified unrelated foster parents, and by refusing to grant such payments to qualified related foster parents, violate Plaintiff related foster parents' right to equal protection as guaranteed by the United States Constitution.

42. By acting as described, *supra*, Defendants create an invidious, arbitrary and capricious classification for which there is no rational basis and which serves no compelling State interest.

43. Defendant by refusing to grant foster care payments are causing immediate, irreparable, permanent and increasing injury to Plaintiff related foster parents for which there is no adequate remedy at law.

44. The challenged statutes and regulations are not saved by the stopgap provision of partial welfare payments from the Department of Public Aid for the reasons set out in paragraphs 33 and 34, *supra*.

SECOND CAUSE OF ACTION

45. Plaintiffs reallege and incorporate by reference paragraphs 1 through 38 above.

46. Defendants' action of granting foster care payments to qualified unrelated foster parents, and by refusing to grant such payments to qualified related foster parents, violates Plaintiff related foster children's right to equal protection as guaranteed by the United States Constitution.

47. By acting as described, *supra*, Defendants create an invidious, arbitrary and capricious classification for which there is no rational basis and which serves no compelling State interest.

48. Defendants by refusing to grant foster care payments are causing immediate, irreparable, permanent and increasing injury to Plaintiff related foster children for which there is no adequate remedy at law.

49. The challenged statutes and regulations are not saved by the stopgap provision of partial welfare payments from the Department of Public Aid for the reasons set out in paragraphs 33 and 34, *supra*.

THIRD CAUSE OF ACTION

50. Plaintiffs reallege and incorporate by reference paragraphs 1 through 38 above.

51. Defendants' action of granting foster care payments to qualified unrelated foster parents, and by refusing to grant such payments to qualified related foster parents, denies Plaintiff related foster children's right to equal protection by economically discriminating against those members of the class of Plaintiffs' children who could live with otherwise qualified and willing relatives but for the lack of State foster care payments. Foster children whose qualified relatives can afford to care for them without State payment, continue to receive the benefits of close family associations. Such discrimination based on wealth violates the Constitution of the United States, and the policy favoring placement with relatives wherever possible.

52. By acting as described, *supra*, Defendants create an invidious, arbitrary and capricious classification for which there is no rational basis and serves no compelling State interest.

53. Defendants by refusing to grant foster care payments are causing immediate, irreparable, permanent and increasing injury to Plaintiff related foster children for which there is no adequate remedy at law.

54. The challenged statutes and regulations are not saved by the stopgap provision of partial welfare payments from the Department of Public Aid for the reasons set out in paragraphs 33 and 34, *supra*.

PRAYER FOR RELIEF

55. Wherefore, Plaintiffs, on behalf of themselves and all others similarly situated respectfully pray:

55(a) That this Court assume jurisdiction of this cause and receive Plaintiffs application for a Three-Judge District Court pursuant to 28 U.S.C. Secs. 2281, 2284;

55(b) That this Court immediately notify the Chief Judge of this Circuit of the application to convene a Three-Judge District Court pursuant to 28 U.S.C. Secs. 2281, 2284;

55(c) That a Three-Judge District Court be convened to hear and adjudicate all questions in the cause;

55(d) That the Three-Judge District Court determine by order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action;

55(e) That the Three-Judge District Court enter a final judgment permanently enjoining the State Director of the Illinois Department of Children and Family Services, and his successors, employees, or agents, and all other persons in active concert and participation, from enforcing, applying, or executing Ill. Revised Statutes, Ch. 23, § 2212.05 and § 2212.17 and Illinois Department of Children and Family Services Family Placement Manual, Ch. 5 § 3 at 95 through 97 as written because said statutes and regulations violate equal protection of the

law as guaranteed by Plaintiffs by the Fourteenth Amendment to the Constitution of the United States.

55(f) That the Three-Judge District Court order such other relief as may be deemed just, including the costs of this action, and reasonable attorneys fees.

Respectfully submitted,

MARCEL YOUAKIM
LINDA YOUAKIM
MARY LOU ROBERTSON (a minor)
TIMOTHY ROBERTSON (a minor)
LARRY ROBERTSON (a minor)
SHERRY ROBERTSON (a minor)

/s/ Patrick A. Keenan
Attorney for Plaintiffs

Of Counsel: Bogdan Martinovich '74
De Paul University College
of Law

[Affidavit of Verification Omitted]

EXHIBIT I

State of Illinois
DEPARTMENT OF CHILDREN AND FAMILY SERVICES
Division of Child Welfare

RELATIVE HOME PLACEMENT AGREEMENT

Date of Placement 1/7/72

The Division of Child Welfare, Department of Children and Family Services, has approved the home of Mr. and Mrs. Marcel Youakim, address 1720 Mannheim Rd., Des Plaines, Ill., for the care of a foster child: Name: Timothy Robertson, Born 5/1/65.

* * *

The district worker will visit the above home in order to:

Know the child and keep informed regarding his adjustment.

Assist the * * * family and the child in problems that may arise.

Discuss information regarding the child's family and background in order to assist the * * * family in understanding and helping the child.

Plan for meeting the clothing, medical care, and other needs of the child.

Discuss any changes in planning for the child.

The Department has the right and authority to remove the child when it appears that this is in his best interests, and agrees to give at least two weeks notice prior to removal if at all possible. However, in those instances in which the Department receives substantiated evidence that the child is receiving improper care or treatment, the Department will remove the child immediately pending investigation. The * * * parents agree to cooperate with the Department and to:

Share with the worker their experiences with the child.

Comply with requirements for regular medical and dental examinations.

Report to the worker any illness of the child and any need for medical care.

Call a physician immediately and notify the district office as soon as possible in case of acute illness or accident.

Discuss any change in plans for the child with the worker.

Plan clothing and other needs with the worker.

Consult the worker regarding any extended trip being planned for the child. When the trip is out-of-state, consent from the district office is necessary.

Cooperate with the worker regarding visits between the child and his family either in the * * * home, office, or elsewhere; treat the parents courteously, and refrain from criticizing them in the child's presence.

Plan with the worker before making religious commitments for the child, such as baptism, confirmation, and church membership.

Keep confidential all information regarding the child and his family.

Make no arrangements for boarding other children without approval of the worker.

Report any changes in the * * * family's situation, or circumstances, which may affect the welfare of the child or the * * * family's ability to continue giving care. Give the worker at least two weeks notice, in any situation, when requesting that the child be removed. More than two weeks is often needed to complete planning for the child.

It is understood by both the worker and the * * * parents that the child is not placed for adoption in this * * * home, and that the child may be removed by the Department when it appears to be for the child's best interests.

This placement agreement, made in good faith and mutual confidence, is equally binding on the Department and the * * * ABOVE NAMED RELATIVES.

(District office stamp)

/s/ Marcel Youakim, 1/7/72
* * * M. Youakim
brother-in-law

/s/ Linda Youakim, 1/7/72
Sister—Linda Youakim

/s/ Christine Mendoza
(Department Representative) 1/7/72

EXHIBIT A TO COMPLAINT

Chapter 23 Illinois Revised Statutes

2212.05 Facility for child care, defined.] § 2.05. "Facility for child care" or "child care facility" means any person, group of persons, agency, association or organization, whether established for gain or otherwise, who or which receives or arranges for care or placement of one or more children, unrelated to the operator of the facility, apart from the parents, with or without the transfer of the right of custody in any facility as defined in this Act, established and maintained for the care of children.

2212.17 Foster family home and types of homes, defined.] § 2.17. "Foster family home" means a facility for child care in residences of families who receive no more than 8 children unrelated to them, unless all the children are of common parentage, for the purpose of providing family care and training for the children on a full-time basis. The family's own children, under 18 years of age, shall be included in determining the maximum number of children served. The term "foster family home" includes homes receiving children from any State-operated institution for child care; or from any agency established by a municipality or other political subdivision of the State of Illinois authorized to provide care for children outside their own homes. The types of foster family homes are defined as follows:

(a) "Boarding home" means a foster family home which receives payment for regular full-time care of a child or children.

(b) "Free home" means a foster family home other than an adoptive home which does not receive payments for the care of a child or children.

(c) "Adoptive home" means a foster family home which receives a child or children for the purpose of adopting the child or children.

(d) "Work-wage home" means a foster family home which receives a child or children who pay part or all of their board by rendering some services to the family

not prohibited by the Child Labor Law[1] or by standards or regulations of the Department prescribed under this Act. The child or children may receive a wage in connection with the services rendered the foster family.

(e) "Agency-supervised home" means a foster family home under the direct and regular supervision of a licensed child welfare agency, of the Department of Children and Family Services, of a circuit court, or of any other State agency which has authority to place children in child care facilities, and which receives no more than 8 children, unless of common parentage, who are placed and are regularly supervised by one of the specified agencies.

(f) "Independent home" means a foster family home, other than an adoptive home, which receives no more than 4 children, unless of common parentage, directly from parents, or other legally responsible persons, by independent arrangement and which is not subject to direct and regular supervision of a specified agency except as such supervision pertains to licensing by the Department.

[1] Chapter 48, § 31.1 et seq.

EXHIBIT B TO COMPLAINT

Chapter 23 Illinois Revised Statutes

§ 5001. Purpose

The purpose of this Act is to create a Department of Children and Family Services to provide social services to children and their families, to operate children's institutions, and to provide certain other rehabilitative and residential services as enumerated in this Act. 1963, June 4, Laws 1963, p. 1061, § 1.

5005. Direct child welfare services.] § 5. To provide direct child welfare services when not available through other public or private child care or program facilities.

For purposes of this Section:

The term "children" means persons found within the State who are under the age of 18 years at the time of acceptance for service or care. The term also includes children under age 18 and children age 18 or more, but under age 21 who (1) are in foster care under order of a court and (2) were, at any time before August 1, 1969, recipients of foster care under Sections 6-4 or 12-8.6 of "The Illinois Public Aid Code", approved April 11, 1967, as amended.[1]

The term "child welfare services" means public social services which supplement or substitute for parental care and supervision for the purpose of: (1) preventing or remedying or assisting in the solution of problems which may result in the neglect, abuse or exploitation of children; (2) protecting and caring for homeless, dependent or neglected children; (3) protecting and promoting the welfare of children, including the strengthening of their own families and counseling of family members; (4) providing adequate care of children away from their homes, where needed, in foster family homes or day care or other child care facilities; or (5) providing counseling for mentally retarded, physically, and socially handicapped children and their parents when not otherwise available.

[1] Chapter 23, §§ 6-4, 12-18.6.

The Department shall establish and maintain tax-supported child welfare services and extend and seek to improve voluntary services throughout the State, to the end that services and care shall be available on an equal basis throughout the State to children requiring such services.

For the purpose of insuring effective state-wide planning, development, and utilization of resources for the day care of children, operated under various auspices, the Department is hereby designated to coordinate all day care activities for children of the State and shall:

(1) Develop a comprehensive day-care plan for the State which identifies high-priority areas and groups, relating them to available resources, and identifying the most effective approaches to the use of existing day care services. The plan shall include methods and procedures for the development of additional day care resources for children to meet the goal of reducing short-run and long-run dependency and to provide necessary enrichment and stimulation to the education of young children. Recommendation shall be made for State policy on optimum use of private and public, local, state and federal resources. A written plan shall be submitted to the Governor, annually, on January 1, and shall include an evaluation of developments over the preceding year, including cost-benefit analyses of various arrangements.

(2) The Department shall conduct day care planning activities within the following priorities:

(a) development of voluntary day care resources wherever possible, with the provision for grants-in-aid only where demonstrated to be useful and necessary as incentives or supports;

(b) emphasis on service to children of recipients of public assistance where such service will allow training or employment of the parent toward achieving the goal of independence;

(c) maximum employment of recipients of public assistance in day care centers and day care homes, operated in conjunction with short-term work training programs:

(d) care of children from families in stress and crisis whose members potentially may become, or are in danger of becoming, non-productive and dependent;

(e) expansion of family day care facilities wherever possible;

(f) location of centers in economically depressed neighborhoods, preferably in multi-service centers with cooperation of other agencies;

(g) use of existing facilities free of charge or for reasonable rental wherever possible in lieu of construction.

(3) Based on its planning activities, the Department shall actively stimulate the development of public and private resources at the local level. It shall also seek the fullest utilization of federal funds directly or indirectly available to the Department.

(4) Where appropriate, existing non-governmental agencies or associations shall be involved in planning by the Department.

The Department shall establish rules and regulations concerning its operation of programs established to meet these purposes, including but not limited to adoption, foster care, family counseling, protective services, service to unwed mothers, homemaker service, return of runaway children, and interstate services.

The Department may provide financial assistance, and shall establish rules and regulations concerning such assistance, to persons who adopt physically or mentally handicapped, older and other hard-to-place children who immediately prior to their adoption were legal wards of the Department. The amount of assistance may vary, depending upon the needs of the child and the adoptive parents, but must be less than the monthly cost of care of the child in a foster home. Special purpose

grants are allowed where the child requires special service but such costs may not exceed the amounts which similar services would cost the Department if it were to provide or secure them as guardian of the child.

The Department shall accept the care and training any child who has been adjudicated neglected or dependent committed to it pursuant to the "Juvenile Court Act".[2] The Department may, at its discretion except for those children also adjudicated neglected or dependent, accept for care and training any child who has been adjudicated delinquent or as a minor in need of supervision, under the "Juvenile Court Act", but no such child shall be committed to the Department by any court without the approval of the Department.

The Department may assume temporary custody of any child (1) if it has received a written consent to such temporary custody signed by the parents of the child or by the parent having custody of the child if the parents are not living together or by the guardian or custodian of the child if the child is not in the custody of either parent or (2) if the child is found in the State and neither a parent, guardian nor custodian if the child can be located. The Department shall have the authority, responsibilities and duties that a legal custodian of the child would have pursuant to Section 1-12 of the "Juvenile Court Act".[3] A parent, guardian or custodian of a child in the temporary custody of the Department who would have custody of the child if he were not in the temporary custody of the Department may deliver to the Department a signed request that the Department surrender the temporary custody of the child. The Department may retain temporary custody of the child for 10 days after the receipt of the request, during which period the Department may cause to be filed a petition pursuant to the "Juvenile Court Act". If a petition is so filed, the Department shall retain temporary custody of the child until the court orders otherwise. If a petition is not filed within the 10 day period, the child shall

[2] Chapter 37, § 701-1 et seq.

[3] Chapter 37, § 701-12.

be surrendered to the custody of the requesting parent, guardian or custodian not later than the expiration of the 10 day period, at which time the authority and duties of the Department with respect to the temporary custody of the child shall terminate. The Department may place children under 18 years of age in licensed child care facilities when in the opinion of the Department, such placement would be for their best interest. Payment for board, clothing, care, training and supervision of any child placed in a licensed child care facility may be made by the Department, by the parents or guardians of the estates of those children, or by both the Department and the parents or guardians, except that no payments shall be made by the Department for any child placed in a licensed child care facility for board, clothing, care, training and supervision of such a child that exceed the average percapita cost of maintaining and of caring for a child in institutions for dependent or neglected children operated by the Department. However, such restriction on payments does not apply in cases where children require specialized care and treatment for problems of severe emotional disturbance, physical disability, social adjustment, or any combination thereof and suitable facilities for the placement of such children are not available at payment rates within the limitations set forth in this Section.

The Department may receive and shall use, in its entirety, for the benefit of children any gift, donation or bequest of money or other property which is received on behalf of such children, or any financial benefits to which such children are or may become entitled while under the jurisdiction or care of the Department.

Amended by P.A. 76-2041, § 1, eff. July 1, 1970; P.A. 77-1374, § 1, eff. Aug. 31, 1971.

Appendix C To Complaint

Title 42 United States Code

§ 601. Appropriations

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

Aug. 14, 1935, c. 531, Title IV, § 401, 49 Stat. 627; 1946 Reorg. Plan No. 2, § 4, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; 1953 Reorg. Plan No. 1, §§ 5, 8, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631; Aug. 1, 1956, c. 836, Title III, § 312(a), 70 Stat. 848; July 25, 1962, Pub. L. 87-543, Title I, § 104(a)(4), (c)(2), 76 Stat. 185, 186; Jan. 2, 1968, Pub. L. 90-248, Title II, § 241(b)(1), 81 Stat. 916.

§ 625. "Child-welfare services" defined

For purposes of this subchapter, the term "child-welfare services" means public social services which supplement, or substitute for, parental care and supervision for the purpose of (1) preventing or remedying, or assisting in the solution of problems which may result, in the neglect, abuse, exploitation, or deliquency of children, (2) protecting and caring for homeless, dependent, or neglected

children, (3) protecting and promoting the welfare of children of working mothers, and (4) otherwise protecting and promoting the welfare of children, including the strengthening of their own homes where possible, or where needed, the provision of adequate care of children away from their homes in foster family homes or day-care or other child-care facilities.

Aug. 14, 1935, c. 531, Title IV, § 425, as added Jan. 2, 1968, Pub. L. 90-248, Title II, § 240(c), 81 Stat. 914.

Appendix D To Complaint

Chapter 37 Illinois Revised Statutes

§ 701-2. Purpose and Policy

(1) The purpose of this Act is to secure for each minor subject hereto such care and guidance, preferably in his own home, as will serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should be given by his parents, and in cases where it should and can properly be done to place the minor in a family home so that he may become a member of the family by legal adoption or otherwise.

(2) In all proceedings under this Act the court may direct the course thereof so as promptly to ascertain the jurisdictional facts and fully to gather information bearing upon the current condition and future welfare of persons subject to this Act. This Act shall be administered in a spirit of humane concern, not only for the rights of the parties, but also for the fears and the limits of understanding of all who appear before the court.

(3) This Act shall be liberally construed to carry out the foregoing purpose and policy.

Laws 1965, p. 2585, § 1-2, eff. Jan. 1, 1966.

Appendix E To Complaint

Title 42 United States Code

42 § 608 PUBLIC HEALTH AND WELFARE

§ 608. Payment to States for foster home care of dependent children; definitions

Effective for the period beginning May 1, 1961—

(a) the term "dependent child" shall, notwithstanding section 606(a) of this title, also include a child (1) who would meet the requirements of such section 606(a) or of section 607 of this title except for his removal after April 30, 1961, from the home of a relative (specified in such section 606(a)) as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child, (2) whose placement and care are the responsibility of (A) the State or local agency administering the State plan approved under section 602 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of such State plan has made an agreement which is still in effect and which includes provision for assuring development of a plan, satisfactory to such State agency, for such child as provided in paragraph (f)(1) and such other provisions as may be necessary to assure accomplishment of the objectives of the State plan approved under section 602 of this title, (3) who has been placed in a foster family home or child-care institution as a result of such determination, and (4) who (A) received aid under such State plan in or for the months in which court proceedings leading to such determination were initiated, or (B)(i) would have received such aid in or for such month if application had been made therefor, or (ii) in the case of a child who had been living with a relative specified in section 606(a) of this title within 6 months prior to the month in which such proceedings were initiated, would have received such

aid in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made therefor;

(b) the term "aid to families with dependent children" shall, notwithstanding section 606(b) of this title, include also foster care in behalf of a child described in paragraph (a) of this section—

(1) in the foster family home of any individual, whether the payment therefor is made to such individual or to a public or nonprofit private child-placement or child-care agency, or

(2) in a child-care institution, whether the payment therefor is made to such institution or to a public or non-profit private child-placement or child-care agency, but subject to limitations prescribed by the Secretary with a view to including as "aid to families with dependent children" in the case of such foster care in such institutions only those items which are included in such term in the case of foster care in the foster family home of an individual.

(c) the number of individuals counted under clause (A) of section 603(a)(1) of this title for any month shall include individuals (not otherwise included under such clause) with respect to whom expenditures were made in such month as aid to families with dependent children in the form of foster care; and

(d) services described in paragraph (f)(2) of this section shall be considered as part of the administration of the State plan for purposes of section 603(a)(3) of this title;

but only with respect to a State whose State plan approved under section 602 of this title—

(e) includes aid for any child described in paragraph (a) of this section, and

(f) includes provision for (1) development of a plan for each such child (including periodic review of the necessity for the child's being in a foster family home or child-care institution) to assure that he

receives proper care and that services are provided which are designed to improve the conditions in the home from which he was removed or to otherwise make possible his being placed in the home of a relative specified in section 606(a) of this title, and (2) use by the State or local agency administering the State plan, to the maximum extent practicable, in placing such a child in a foster family home or child-care institution, of the services of employees, of the State public-welfare agency referred to in section 722(a) of this title (relating to allotments to States for child welfare services under sections 721-728 of this title) or of any local agency participating in the administration of the plan referred to in such section, who perform functions in the administration of such plan.

For purposes of this section, the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing; and the term "child-care institution" means a nonprofit private child-care institution which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing.

Aug. 14, 1935, c. 531, Title IV, § 408, as added May 8, 1961 Pub.L. 87-31, § 2, 75 Stat. 76, and amended July 25, 1962, Pub.L. 87-543, Title I, §§ 101(b)(2)(D), 104(a)(3)(F), (G), 131(b), 135(a)-(d), 155(a), 76 Stat. 180, 185, 193, 196, 197, 207; Jan. 2, 1968, Pub.L. 90-248, Title II, §§ 201(e)(4), 205(c), 81 Stat. 880, 892.

APPENDIX F TO COMPLAINT

ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES

Social Services—PLACEMENT MANUAL July 17, 1972

Chapter Three

SPECIAL CHILD CARE PROGRAMS

Part Five: PLACEMENT WITH RELATIVES

I. DEFINITION

"Relative" means a person having any of the following relationships to the child by blood, marriage, or adoption: grandparents, brother, sister, stepbrother, stepsister, uncle or aunt. By administrative interpretation the definition has been broadened to include great-uncle, great-aunt and great-grandparent. Such "related" persons are not subject to foster home licensing whereas all other "relative" homes are subject to study and licensing as a foster family home.

II. LEGAL BASE

The Act Creating the Department of Children and Family Services authorizes provision of child welfare services which supplement or substitute parental care. Provision of such services does not preclude placement of a child under care with approved relatives.

III. SCOPE OF SERVICE

The primary consideration in placement of a child with relatives are the needs of the child. Such placement, if indicated, is designed to reinforce the child's identification with "family."

IV. CRITERIA

If a relative home is to be considered as a placement resource the home must reasonably meet the minimum

standards cited in Chapter Two, Section IV. Relative resources should be explored for all children for whom placement is indicated with the exception of children relinquished for adoption.

V. INTAKE

A. Request For Service

(1) The district office should check with the Illinois Department of Public Aid as a potential financial resource for the child(ren) living with relatives at the time of referral or for whom relatives are interested in accepting for care.

(2) Form CFS-602, *Medical Report on An Adult or Child in a Licensed Child Care Facility*, must be completed for all members of the household if a relative home is being considered as a placement resource.

B. Evaluation

Interest and concern of relatives in the child(ren); the feeling of relatives toward parents; ability to cooperate with the Department; and, placement of choice of the parents and child(ren) must all be explored as essential elements for a successful placement.

C. Disposition

In all relative placements the district office should approach the court seeking a court order appointing the Guardianship Administrator or the approved relative as guardian of the person of the child(ren) to insure the availability of a person to make decisions in behalf of the child(ren) and to prevent removal of the child(ren) by unauthorized persons.

VI. PROCEDURES FOLLOWING CASE ACCEPTANCE

A. The District Office will:

(1) Arrange for placement and authorize payment, if indicated and approved by Social Service Administrator, Metropolitan or Downstate Area.

(2) Supervise placement and provide casework services to the family or relatives on behalf of the child(ren).

B. The Relative will:

(1) Accept terms of placement such as duration and agency goals for the child(ren) and work cooperatively with the agency to achieve these goals.

(2) Respect the parents desires for religious training for the child(ren).

Chapter Three

Part Five—Appendix 1—Fiscal Policies and Procedures

SPECIAL CHILD CARE PROGRAMS

I. PLACEMENT WITH RELATIVES

A. The Department has no statutory authority to pay relatives for the care of children. Only the Social Service Administrator of Metropolitan or Downstate Area may authorize such payment and it will not be authorized without written approval. A request for payment of a relative shall include: summary of the child's situation; legal status; reason for considering the proposed placement as desirable for the child; financial circumstances of the relatives; and, monthly rate for which approval is requested.

B. If payment is to be made it shall be an *inclusive* rate which *does not exceed* the regular *rates* paid to *Division of Child Welfare foster family homes.*

C. Monthly payment to relatives is authorized by directing completed Form CFS-903, *Payment Authorization*, to the Division of Methods and Information Services, State Administrative Office, Springfield, 62706. Indicate in Section 4, Type of Payment #34 Relative—"legally exempt from licensing." Monthly amount to be entered in Section 5 Payments—Board. (See Chapter Two, Appendix 1, IIA—Monthly Payment Rate.)

D. Initial placement clothing may be authorized by use of Forms CFS-932, *Purchase Authorization*, and FA-13, *Invoice-Voucher*. The vendor(s) should direct the completed forms to the Division of Administrative Services, State Administrative Office, Springfield, 62706, for payment. (See Chapter Two, Appendix 1, II B—Initial Clothing Allowance.)

E. Form CFS-425, *Foster Home Placement Agreement*, is to be signed in duplicate by the relative payee and the district worker with changes to indicate the relationship of the caretaker(s) to the child. One copy is kept by the relative and the other filed in the child's record.

Defendants' Motion to Strike and Dismiss Complaint, to Stand as to Second Amended Complaint

Filed April 2, 1973

[Caption Omitted in Printing]

NOW COME Defendants JEROME MILLER, individually and as Director of the Illinois Department of Children and Family Services, and the DEPARTMENT OF CHILDREN AND FAMILY SERVICES, by their attorney WILLIAM J. SCOTT, Attorney General of the State of Illinois, and pursuant to Rule 12 of Federal Rules of Civil Procedure respectfully move this Court to strike and dismiss the Plaintiffs' Complaint. In support of this Motion, the Defendants herein state as follows:

1. The allegations contained in Plaintiffs' Complaint, which purport to set forth a violation of equal protection, specifically Ill. Rev. Stat. Chapter 23, Sections 2212.05 and 2212.17, are conclusory in nature and fail to state a cause of action or state a claim upon which relief may be granted.

A. Said statute as it stands is a valid legislative classification permissible under state and federal law and does not constitute arbitrary, capricious or invidious discrimination in violation of U.S.C. Constitutional Amendment 14.

2. This Court does not have jurisdiction over the subject matter as to these defendants.

A. Plaintiffs by bringing suit against the Department of Children and Family Services is in effect bringing suit against the State.

B. The State of Illinois has not consented to be sued by Plaintiffs in Federal Court and as such cannot be made subject of such suit by virtue of its grant of immunity by U.S.C. Constitutional Amendment II.

C. In the event this Court should determine that its jurisdiction does in fact attach hereto, it should abstain from exercising such jurisdiction by virtue of there being an effective remedy existing at the level of the State Courts.

3. The class action commenced herein is improperly brought and fails to meet the requirement demanded of such action in that:

A. The claims of Plaintiffs are not representative of the class as a whole.

B. The Plaintiffs as representative cannot adequately protect the intreests of teh class.

C. There is doubt as to whether there exists a common question of law or fact applicable to the entire class.

Respectfully submitted,

William J. Scott
Attorney General of Illinois

Richard L. Ryan
Special Ass't Atty General
(Of Counsel)

[Notice of Filing and Certificate of Service Omitted]

MOTION TO CONVENE THREE-JUDGE DISTRICT COURT

Filed April 16, 1973

[Caption Omitted in Printing]

Now come Plaintiffs MARCEL YOUAKIM and LINDA YOUAKIM, et al., by their attorney PATRICK A. KEENAN, DePaul Law Clinic, and respectfully move this Court to immediately notify the Chief Judge of this Circuit to convene a Three-Judge District Court pursuant to 28 U.S.C. §§ 2281, 2284 to hear and adjudicate all questions in this cause. As grounds for this motion, Plaintiffs state:

This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284 since Plaintiffs seek a permanent injunction to restrain the defendant, who is a state officer, from the enforcement, application and execution of state statutes (Ill. Rev. Stats. Ch. 23 §§ 2212.05, 2212.17) of state-wide applicability on the grounds that said statutes, which authorize state foster care payments to foster children in homes of unrelated foster parents, but which deny state foster care payments to foster children in homes of foster parents in any way related to them, are in violation of the equal protection clause of the United States Constitution.

Respectfully submitted,

/s/ PATRICK A. KEENAN
Attorney for Plaintiffs

Of Counsel: Bogdan Martinovich '74
DePaul University College of Law

ORDER DESIGNATING THE HONORABLE PAUL STEVENS, CIRCUIT JUDGE, HONORABLE ABRAHAM L. MAROVITZ, DISTRICT JUDGE, AND HONORABLE PHILIP W. TONE, DISTRICT JUDGE TO SERVE AS MEMBERS OF A THREE-JUDGE COURT

No. 73 C 635

Filed May 25, 1973

[Caption Omitted in Printing]

The undersigned Chief Judge of the Seventh Circuit having been notified by the Honorable Philip W. Tone, United States District Judge for the Northern District of Illinois, of the filing of the above-mentioned cause, does hereby pursuant to Title 28 U.S.C. § 2284 designate the

HONORABLE JOHN PAUL STEVENS

a United States Circuit Judge for the Seventh Judicial Circuit and the

HONORABLE ABRAHAM L. MAROVITZ

a United States District Judge for the Northern District of Illinois, to serve with the

HONORABLE PHILIP W. TONE

as members of a three-judge United States District Court to hear and determine the above-entitled action or proceeding.

Dated this twenty-fourth day of May, 1973

/s/ Luther Swygert
Chief Judge of the Seventh Circuit

AFFIDAVITS OF FRANK KOPECKY AND RALPH HANEBUTT, IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR ALTERNATIVELY FOR SUMMARY JUDGMENT

Filed Jan. 8, 1974

[Caption Omitted in Printing]

I, Frank J. Kopecky, having been duly sworn on oath hereby states as follows:

(1) I am Chief Counsel for the State of Illinois Department of Children and Family Services and have been employed in this capacity since July, 1972. As Chief Counsel my duties include interpreting State and Federal laws and regulations which affect the Department of Children and Family Services.

(2) The general policy of the Department of Children and Family Services is not to make payments to relatives caring for children under the Department's guardianship beyond the amount which the children may be entitled to under the Aid to Families with Dependent Children Program (AFDC), administered by the State of Illinois Department of Public Aid. However, the Department of Children and Family Services will, as an exception to its general policy, make payments beyond the AFDC amount if the families needs justify the payment. This policy is found in the Department of Children and Family Services' Placement Manual, pages 95-97.

(3) The Department's general policy of not paying relatives is not based on the Child Care Act of 1969 which established licensing criteria, but on the administrative interpretation of the Department and the United States Department of Health Education and Welfare that Federal financial participation would not be available under Section 408 (42 USCA § 608 1972) of the Social Security Act to children living with relatives as defined by Section 406(a) of the Social Security Act (42 USCA § 606(a) 1972).

(4) Under the State of Illinois welfare system the Department of Public Aid administers the Aid to Families with Dependent Children Program (AFDC) and the Department of Children and Family Services administers the much smaller Aid to Families with Dependent Children—Foster Care Program (AFDC-FC).

(5) Children removed from their homes and placed under the guardianship of the Department of Children and Family Services pursuant to the Juvenile Court Act and placed with relatives as defined by § 406 of the Social Security Act would, as a general rule, be entitled to AFDC from the Department of Public Aid. This amount would be approximately $61.00 per child and would be given based on the eligibility criteria of the home from which the child was removed. The wealth of the relatives would not be considered. If the child were placed with non-relatives, the higher AFDC-FC amount would be paid. This amount is approximately $105.00 per child. Eligibility is once again based on the eligibility criteria of the home from which the child was removed.

(6) In addition, the Department of Children and Family Services will as an exception to policy as outlined in its Placement Manual, pages 95-97, make payments up to the full foster care rate if the relatives are needy and an amount beyond the amount paid by the Department of Public Aid is needed to maintain the placement.

/s/ Frank J. Kopecky

[Jurat Omitted]

Affidavit of Ralph Hanebutt in Support of Defendant's Motion to Dismiss

Filed January 8, 1974

[Caption Omitted in Printing]

I, Ralph Hanebutt, having been duly sworn state as follows:

(1) I am the Assistant to the Deputy Director of Program Services, and as such have administrative responsibility for the program and policy of the State of Illinois Department of Children and Family Services.

(2) That the attached pages 95 through 97 are true and correct copies of Chapter 3, Section 5 of the Illinois Department of Children and Family Services Placement Manual and as such reflect the policy of the Department in regards to children placed with relatives.

(3) That as of October 1, 1973, the Department had guardianship of approximately 1500 children placed with relatives of which approximately 140 are receiving payments for care in accordance with the policy outlined on page 97 of the Placement Manual. Such payments are made on the basis of an exception to policy.

(4) That a child receiving payment from the Department of Public Aid under the AFDC program would receive approximately $63.00, while the child receiving payment from the Department of Children and Family Services would receive, on the average, approximately $105.00.

/s/ Ralph L. Hanebutt

[Jurat Omitted]

Plaintiffs' Motion to Strike Certain Portions of Affidavit of Frank Kopecky Filed January 8, 1974 in Support of Defendants' Motion for Summary Judgment

Filed Jan. 24, 1974

[Caption Omitted in Printing]

Plaintiffs, by their attorney, PATRICK A. KEENAN, DePaul Law Clinic, respectfully move this Court to strike paragraphs 2, 3, 4, 5, and 6 of Frank Kopecky's Affidavit in Support of Motion for Summary Judgment filed January 8, 1974, and in support of their motion respectfully state:

1. Under the rules and law of Federal Civil Procedure, affidavits in support of a motion for summary judgment must contain facts or information that could be admitted to evidence, and those portions thereof which are inadmissible should be stricken upon timely objection. *U.S.* v. *Western Electric Co.* 337 F2d 568 (CA9 1964); *Ernst Seidelman Corp.* v. *Mollinson* 10 FRD 426 (S.D. Ohio 1950).

2. Paragraphs 2 and 5 contain statements which are directly inconsistent. Both cannot be true:

2a. Paragraph 2 states: ". . . the Department of Children and Family Services will as an exception to general policy make payments beyond the AFDC amount if the families needs justify the payment." The family referred to is the foster family, and eligibility is based on the foster families' income.

2b. But Paragraph 5 states that: "Eligibility [for the lower ADC subsidy of $61.00 paid related foster parents and the higher subsidy of $105.00 paid non-related foster parents] is once again based on the eligibility criteria of the home from which the child was removed.

2c. Said inconsistency is not resolved by the allegations of Paragraph 6, and Paragraphs 2, 5, and 6 read together do not set out a policy which is consistent or even comprehensible.

3. Rule 56(e) states in part: "Sworn copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." (F.R.C.P. 56 (e)).

4. Paragraph 3 of Kopecky's affidavit states that the basis for the Department's policy is ". . . the administrative interpretation of the Department and of the United States Department of Health, Education and Welfare that Federal financial participation would not be available under Section 408 (42 USCA § 608 1972) of the Social Security Act to children living with relatives as defined by Section 406(a) of the Social Security Act (42 USCA § 606(a) 1972)."

4a. Said administrative interpretation has been reduced to writing and is not attached. There is no cite to the Code of Federal Regulations.

4b. Said allegation is hearsay and incompetent in that the affiant cannot make official interpretations of the Social Security Act for the Department of Health, Education and Welfare.

5. Likewise Paragraph 4 declares the relative jurisdiction of the Department of Public Aid and Department of Children and Family Services. Said jurisdiction or functions are set out in an "Interagency Agreement" which must be attached.

5a. Counsel for Plaintiffs requested a copy of said Interagency Agreement from both affiant Kopecky and Assistant Attorney General Ryan and other lawyers employed by Defendants. None of said lawyers have been able to find it. Failure to produce and attach said document to the affidavit requires that Paragraph 4 be stricken for failure to comply with Rule 56(e). Plaintiffs do not know, and cannot determine without inspecting said Interagency Agreement, whether the statements in Paragraph 4 are accurate.

6. The instant case has been continued several times on the Defendants' or the Court's motion, and Defendants have had ample time to prepare their case and find and attach the above-mentioned documents. An affidavit of Defendants' counsel which purports to offer interpretations of various State and Federal laws and regulations,

some of which are not attached to the Affidavit, and which purports to resolve all contested issues of law and fact, should be stricken. It is not a sufficient basis to require dismissal of, or summary judgment against, the well-pleaded Complaint which describes a clear violation of constitutional equal protection by a scheme discriminatory on its face and admitted to be discriminatory by Defendants.

7. WHEREFORE, Plaintiffs respectfully request that Paragraphs 2, 3, 4, 5, and 6 of Frank Kopecky's Affidavit in Support of Defendants' Motion for Sumary Judgment be stricken, and that Defendants' Motion be denied.

Respectfully submitted,

/s/ PATRICK A. KEENAN
Attorney for Plaintiffs

Of Counsel: Bogdan Martinovich
Senior Law Student
DePaul University College of Law

EVERETT MCLEARY AFFIDAVIT IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR ALTERNATIVELY FOR SUMMARY JUDGMENT

Filed January 24, 1974

[Caption Omitted in Printing]

I, EVERETT MC LEARY, having been duly sworn on oath hereby state as follows:

1. I am a former employee of the Department of Children and Family Services. My position with the Department was that of an executive assistant to Director of the Department. As an executive assistant my duties included processing and administrating various Departmental programs with respect to child care facilities.

2. Foster family homes of related foster parents generally receive the same degree and frequncy and quality of monitoring by Department personnel as do all other foster homes and foster care institutions.

3. Department policy of not providing foster care payments to prospective related foster parents often makes more difficult or entirely precludes placement of related foster children in homes that the Department has decided would otherwise be in the best interest of such child.

4. Foster children placed with related foster parents are, in addition to said foster care payment, denied benefits of certain Department programs. These programs include payment for music lessons, membership fees to clubs and others that foster children living with unrelated foster parents receive.

5. The Department does from time to time, as an exception to policy, provide some foster care payments to related foster parents. When such exceptions to policy are made related foster parents receive foster care payment up to the amount allowable to unrelated foster parents. Such payments are not always made in an amount equal to that received by unrelated foster parents.

6. To my knowledge there was when I was employed, no material published by the Department that sets forth the specific criteria upon which decisions to grant exceptions to policy are based.

7. It is my opinion based upon my experience in the capacity of an executive assistant to the Director of the Department of Children and Family Services that foster care in a foster family home is less expensive than institutional foster care.

8. It is my opinion that certain of the Department's wards now placed in foster care institutions could be placed in foster homes with their relatives, but that such placements do not occur because of the general policy against allowing full subsidy of foster children living with their relatives. To date, this policy has not been changed.

FURTHER this affiant sayeth not.

/s/ Everett McLeary

[Jurat Omitted]

[Jurat Omitted]

PATRICK A. KEENAN
Attorney for Plaintiffs

MEMORANDUM OF DECISION

Reported at 374 F.Supp. 1205

UNITED STATES DISTRICT COURT

N.D. ILLINOIS, E.D.

No. 73 C 635

Feb. 28, 1974

MARCEL YOUAKIM ET AL., PLAINTIFFS

v.

JEROME MILLER Individually and as Director of the Department of Children and Family Services and the Department of Children and Family Services, of the State of Illinois, DEFENDANTS

Patrick A. Keenan, Chicago, Ill., for plaintiffs.

William J. Scott, Atty. Gen., State of Ill., Richard L. Ryan, Asst. Atty. Gen., Chicago, Ill., for defendants.

Before STEVENS, Circuit Judge, and MAROVITZ and TONE, District Judges.

MEMORANDUM OF DECISION

TONE, District Judge.

This suit was commenced as a class action to enjoin the operation of the Illinois foster home program. Under that program foster parents who provide homes for children unrelated to them receive monthly foster care payments from the Department of Children and Family Services, but foster parents who provide homes for children related to them do not receive such payments. Because plaintiffs seek to enjoin the operation of a state statute, a three-judge court was convened pursuant to

28 U.S.C. §§ 2281, 2284. Defendants have now moved to strike and dismiss.

The Illinois statutory scheme allocates federally subsidized payments to foster parents who care for children who are wards of the state. Section 5 of the Department of Children and Family Services Act, Ill.Rev.Stat., 1971, Ch. 23, § 5005, empowers the Department ("CFS") and its Director to

(a) establish rules and regulations concerning foster care;
(b) accept for care and placement in foster homes children adjudicated wards of the state; and
(c) make payments for the board, clothing, care, training and supervision of children placed in licensed foster homes.

Under the Department's eligibility criteria, eligibility for monthly payments, which now approximate $105 per child, depends upon the economic status of the home from which the child was removed, not on the wealth of the foster parents. By authorizing payments only to licensed homes, Section 5 denies eligibility to foster parents providing homes for children related to them, because those foster parents are exempt from licensing under the Child Care Act of 1969, Ill.Rev.Stat., 1971, Ch. 23, §§ 2212.05, 2212.17, and thus cannot be licensed.[1] Foster parents caring for related children are eligible for Aid to Families with Dependent Children ("AFDC") payments under Ill.Rev.Stat., 1971, Ch. 23, §§ 4-1 to 4-11, but in order to receive these payments they must make a separate application to the Department of Public Aid, and more importantly, these monthly payments are only about $63.00 per child. In addition to the AFDC pay-

[1] The parties have directed their arguments primarily to the Illinois Department of Children and Family Services Manual at 95-97 as the authority for denying payments to related foster parents. This manual, however, merely states that "[t]he Department has no statutory authority to pay relatives for the care of children," and thus does no more than summarize what is apparent on the face of the statutes. For the purposes of this opinion, then, Ill.Rev.Stat., 1971, Ch. 23, §§ 2212.05, 2212.17, and 5005 will be considered as the challenged statutes.

ments, some foster families in which the parents and children are related receive additional funds from the Social Service Administration up to the amount of the foster care payments, if the Department of Children and Family Services makes a determination of need. This exception to the general practice is explained only in the CFS placement manual, but according to an affidavit filed by an administrator to CFS, approximately 140 of the 1500 related foster families in the state now receive this extra allowance.

Plaintiffs are Marcel and Linda Youakim, husband and wife; Timothy and Mary Lou Robertson, the minor brother and sister of Linda Youakim who have been living with their foster parents the Youakims since 1972; and Larry and Sherry Robertson, the minor brother and sister of Linda Youakim who have been living in foster care facilities operated by persons unrelated to them since 1969. The Youakims allege that because they do not receive the full foster care payments, they suffer severe financial hardship in caring for Timothy and Mary Lou, and are financially unable to take in Larry and Sherry. On behalf of themselves and all other persons similarly situated, plaintiffs assert that the distinction between related and unrelated foster parents for the purpose of determining eligibility for foster care benefits denies them equal protection of the laws as guaranteed by the Fourteenth Amendment, and they ask that defendants, the Illinois Department of Family Services and its director, be enjoined from enforcing, applying or executing this program.

Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, defendants have moved to strike and dismiss the complaint, asserting, in addition to an abstention ground which we do not reach.

(1) the Court does not have jurisdiction over the subject matter;
(2) the action should not be maintained as a class action; and
(3) plaintiffs have failed to state a claim upon which relief may be granted.

Both sides having filed affidavits asserting facts outside the pleadings, we treat the motion as one for summary judgment, as we are authorized to do by the last sentence of Rule 12(b).

At the oral argument plaintiffs urged that an evidentary hearing should be held. In the view we take of the case, if the evidence most favorable to plaintiffs' contentions is assumed, judgment must be entered for defendants. An evidentiary hearing is, therefore, unnecessary.

Jurisdiction

[1] Defendants argue that this Court lacks jurisdiction because the action is in effect against the State of Illinios and therefore is barred by the sovereign immunity provision of the Eleventh Amendment. This argument is without merit. Beginning with Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), it has been held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the state and thus is not prohibited by the Eleventh Amendment. This rationale has been consistently followed in numerous civil rights cases and other actions where the application or execution of state statutes has been enjoined, *cf.* Townsend v. Swank, 404 U.S. 282, 92 S.Ct. 502, 30 L.Ed.2d 448 (1972); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), and has been applied to permit suits against state officials to test the constitutionality of statutes under which they are acting, Hill v. Wallace, 259 U.S. 44, 42 S.Ct. 453, 66 L.Ed. 822 (1922); Hammer v. Dagenhart, 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101 (1918). Indeed, under this rationale courts have assumed jurisdiction over many recent suits against state officials brought for the purpose of attacking social welfare schemes similar to the one here in question. *Cf., e.g.,* Gaither v. Sterrett, 346 F.Supp. 1095 (N.D.Ind. 1972); Jefferies v. Sugarman, 345 F.Supp. 172 (S.D.N.Y.1972); Dimery v. Department of Social Services, 344 F.Supp. 1181 (S.D. Iowa 1972); Alexander v. Swank, 314 F.Supp. 1072

(N.D.Ill.1970). The Court has jurisdiction to decide this case.

Class Action Issue

[2, 3] Another preliminary question is the propriety of maintaining this action as a class action. If the requirements of Rule 23, F.R.Civ.P., are met, a court normally must approve a class action. Fujishima v. Board of Education, 460 F.2d 1355, 1360 (7th Cir. 1972); but see Ihrke v. Northern States Power Co., 459 F.2d 566, 572 (8th Cir. 1972). Defendants argue that the claims of the named plaintiffs are not typical because not all foster parents will be financially unable to care for children related to them if they do not receive payments from the state. This argument ignores the basis of plaintiffs' claims. Plaintiffs are not challenging a system where payments are made to some and denied to others on the basis of need, but a scheme whereby, irrespective of the individualized needs of the foster parents, payments are made to families where the foster parents and children are unrelated, but, as a general rule, not to related foster families. The exception to the general policy allows payments to related foster families in certain cases, but even in light of this, related foster parents as a class are treated differently than unrelated foster parents, because in order to qualify under this exception they must meet a certain level of need which the unrelated foster parents do not have to meet. Thus, the interests of the named plaintiffs are typical of the class and, the other requirements of Rule 23 also having been met, the class action will be approved.

Other Preliminary Matters

[4-6] Before proceeding to the merits, we must first dispose of several other matters. One of these is plaintiffs' motion to strike certain allegations of an affidavit in support of defendants' motion by Frank J. Kopecky, Chief Counsel for CFS. Plaintiffs first seek to strike reference to the exception to the scheme under attack

whereby under certain circumstances related foster parents are given payments in an amount equal to those given to unrelated foster parents. This motion will be denied, for plaintiffs have not presented adequate grounds to strike these allegations, and plaintiffs themselves have filed affidavits which refer to the same exception. Next, plaintiffs seek to strike an allegation in the affidavit which refers to an administrative determination as the basis for the Department's policy of generally not paying related foster parents. This allegation will be stricken because of the affiant's failure to state specific facts from which we can determine his personal knowledge of this matter. Finally, plaintiffs seek to strike statements relating to the respective jurisdictions of the Department of Public Aid and the Department of Children and Family Services. Plaintiffs' motion in this respect will be denied, the affiant being capable of testifying as to these matters from his own personal knowledge.

The Merits

[7] We turn now to the equal protection question. A state statute dealing with social welfare need only be rationally based and free from invidious discrimination. Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). Since the statutes challenged here fall within the category governed by the *Dandridge* rule, their validity depends upon whether the distinction between related and unrelated foster parents is based on differences that are reasonably related to the legitimate purposes of the foster care program. Morey v. Doud, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1953).

[8] Plaintiffs argue that, by providing for state aid only to foster parents who are unrelated to the child and denying it to others, the state has breached its duty to provide equally for all dependent children and has in fact contributed to the breakup of family homes. They assert that since related foster parents have the same need for state subsidies to provide adequately for their foster children as do unrelated foster parents, there is no basis for the distinction. Although this statement

of the state's duty may indeed be correct, plaintiffs have failed to recognize both the purpose for which the payments are made and the test to be employed in examining the classification of the statute. When a classification in a law such as this is called into question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. Morey v. Doud, *supra*, 354 U.S. 457; Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911).

[9] At the time this statute was enacted, the Illinois General Assembly could reasonably have been concerned about how to use available public funds to provide as many foster homes as possible. It could reasonably have set out to provide for allocation of the available funds in a manner designed to secure the maximum number of foster parents for children who would otherwise remain parentless. A reasonable method of achieving this goal would have been to provide for the distribution of funds only to persons who would otherwise have had no particular reason or incentive for becoming foster parents rather than allocating the funds to all persons who become foster parents and thereby reducing the amount received by each; and it is on this basis that the defendants assert the classification was made. Allegedly, the state perceived a moral obligation on behalf of related foster parents to care for their related children which could not or would not be deepened by providing them a pro rata portion of the available funds. Therefore, according to the defendants, the state decided that the money which could have been alloted to related foster parents would be better used as added inducement to unrelated parents.

This classification, the wisdom of which is not for us to determine, bears a rational relationship to the legitimate purpose of attempting to assure that foster homes are made available. Some related foster parents may not be able to afford the responsibility of caring for additional children,[2] but the state argues that the scheme

[2] Of course, this possibility is lessened by the fact that AFDC payments are generally available.

was not enacted to alleviate this problem, and from the fact that payments are not based on the relative wealth of the foster parents, this contention is borne out. In this respect, the case at bar differs from United States Department of Agriculture v. Moreno, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973), a case in which the Supreme Court held unconstitutional a statutory scheme which excluded from participation in the food stamp program any household containing an individual who is unrelated to any other member of the household. The critical point of that decision, and the basis upon which it is distinguishable from the case at bar, is that the purpose of the food stamp program was to alleviate hunger, and that to fulfill this purpose it had to be administered on the basis of need rather than on the basis of the relationships of the people constituting one economic unit and sharing cooking facilities.

More analogous to the case at bar is Ramos v. Montgomery, 313 F.Supp. 1179 (S.D.Cal. 1970), aff'd, 400 U.S. 1003, 91 S.Ct. 572, 27 L.Ed.2d 618 (1971), a case involving a challenge to a California scheme under which AFDC payments made to natural parents were substantially less than payments made to foster parents. The Court in that case recognized that maintenance of the family structure was an important consideration in any child welfare program and that some natural parents were financially unable to provide suitable homes for their children, but nevertheless upheld the classification on the ground that the overriding purpose of the statute was the overall interest of the public in the protection of children[3] and that this purpose was reasonably served

[3] Among the stated purposes for which child welfare services are authorized under the Illinois Department of Children and Family Services Act are "protecting and caring for homeless dependent or neglected children"; "protecting and promoting the welfare of children, including the strengthening of their own families and counseling of family members"; and "providing adequate care of children away from their homes, where needed, in foster family homes." Ill.Rev.Stat., 1971, Ch. 23, § 5005. On the basis of this language, it can be inferred that, as in *Ramos*, although strengthening of the family unit is an important concern of the Act, the

by a plan which was motivated to provide as many foster homes as possible.[4] The *Ramos* case is factually distinguishable from the case at bar, but the reasoning of the court is applicable here. A natural parent's responsibility to its child may stem from a legal duty, whereas a related foster parent's duty is moral, but in either case the result will generally be the same: the parent or relative is likely to care for the child. It is thus reasonable in either case for the state to adopt a program designed to induce families who would not otherwise become foster parents to assume that role.

The challenged classification will cause some children to be separated from their relatives for financial reasons. The state may reasonably have concluded, however, that the greater good of the greater number of children in need of foster homes is served by the classification which has been made. It may have concluded that if the classification were not made, the state's foster homes program would be jeopardized. As the class eligible to receive payments is made more inclusive, the individual payments become smaller. The possibility exists that if related persons are added to the eligible class, the individual payments would be reduced to an amount insufficient to induce qualified unrelated persons to provide foster homes for dependent children. Thus, the purpose of the payments would not be served, and either the fiscal integrity of the program would be impaired or the standards for approval of unrelated persons might have to be compromised.[5]

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primary purpose of the Act is the protection and care of children generally.

[4] Another basis for the decision in *Ramos* was that it was reasonable to expect that foster parents would incur expenses in meeting state licensing requirements which natural parents would not. Whether this rationale is also applicable to the case at bar is difficult to determine, for although relatives are not subject to licensing, they are kept under close scrutiny by CFS. In any event, it is not necessary for us to resolve this question.

[5] A consideration of the consequences of eliminating the classification which plaintiffs challenge will identify another rational basis for it. The payments which are the subject of this litigation

There is language in Townsend v. Swank, *supra*, 404 U.S. at 291, that serious equal protections problems may arise when a state attempts to rely on the concept of fiscal integrity to limit beyond federal statutory standards the class eligible to receive federally subsidized payments, but plaintiffs' argument that that dictum invalidates the Illinois program in question here is of no avail. The regulations interpreting the Federal Social Security Act gives the states "substantial latitude and corresponding responsibility for determining the coverage, nature, and scope of their public assistance programs," and limits this authority only to the extent that "the groups selected for inclusion in the plan . . . must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act." 45 C.F.R. § 233.10. Far from being inconsistent with the federal scheme, the Illinois scheme in general seems to parallel it.[6] The federal statute authorizes aid to the

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are intended to subsidize care for children who have been adjudicated wards of the state. It is manifest that there are many children in Illinois whose natural parents are deceased but who, without being adjudicated wards of the state, are cared for by relatives who are their legal custodians, guardians, or perhaps even adoptive parents. Certainly the state has an interest in encouraging its citizens to care for related minors who have been orphaned by the death of their parents, either by adopting them, accepting the responsibilities of guardianship, or even merely taking informal custody of such minor children without having them adjudicated wards of the state. If the plaintiffs' attack on the Illinois program were sustained, relatives would have a financial inducement to cause orphaned children to be adjudicated wards of the state in order to qualify themselves for foster care payments. The state may rationally conclude that such a financial motivation would contravene the policy of the laws relating to adoption and guardianship.

[6] Plaintiffs argue that the "exception to policy" under which some related foster parents receive additional allotments on the basis of need makes the state scheme unlike the federal. This is a variation, which the federal regulations explicitly allow, 45 C.F.R. § 233.10, but the two schemes are nevertheless parallel.

natural parents and relatives of dependent children in one section, 42 U.S.C. § 606, and aid to foster parents in another, 42 U.S.C. § 608. Additionally, more money is allocated under the federal plan to foster care payments than to regular AFDC payments. 42 U.S.C. § 603(a)(1)(B); see Ramos v. Montgomery, *supra*, 313 F.Supp. at 1182. Thus the federal statute makes the same classification as the Illinois statute.

The Illinois scheme does not deny plaintiffs equal protection of the laws. Summary judgment is entered in favor of defendants.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable PHILIP W. TONE

Cause No. 73 C 635 Date February 28, 1974

Title of Cause Youakim, et al v. Miller, etc., et al

Brief Statement of Order Enter Memorandum of Decision (Draft) JS-6

/s/ Tone, J.

PLAINTIFFS' NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Filed April 23, 1974

[Caption omitted in printing]

Notice is hereby given that MARCEL YOUAKIM, LINDA YOUAKIM, TIMOTHY ROBERTSON, MARY LOU ROBERTSON and SHERRY ROBERTSON, the plaintiffs above-named, hereby appeal to the Supreme Court of the United States from the final order dismissing the complaint entered in this action on February 28, 1974.

This appeal is taken pursuant to 28 U.S.C., § 1253.

Respectfully submitted,

/s/ Patrick A. Keenan
De Paul Law Clinic
Counsel for Plaintiffs

Of Counsel: Bogdan Martinovich '74
DePaul University College of Law

[Notice of Filing and Proof of Service Omitted]

SUPREME COURT OF THE UNITED STATES

No. 73-6935

MARCEL YOUAKIM, ET AL., APPELLANTS

v.

JEROME MILLER, Individually and as Director of the Department of Children and Family Services, ET AL.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis*,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

March 17, 1975

Mr. Justice Douglas took no part in the consideration or decision of this motion.

SUPREME COURT OF THE UNITED STATES

No. 73-6935

MARCEL YOUAKIM, ET AL., APPELLANTS

v.

JEROME MILLER, Individually and as Director of the Department of Children and Family Services, ET AL.

APPEAL from the United States District Court for the Northern District of Illinois.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

March 17, 1975

Mr. Justice Douglas took no part in the consideration or decision of this case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 574442 157

Supreme Court, U. S.
FILED
SEP 16 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1974

No. 73-6935

MARCEL YOUAKIM and LINDA YOUAKIM, individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Plaintiffs-Appellants,

vs.

JEROME MILLER, individually and as Director of the DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Defendants-Appellees.

MOTION TO DISMISS, OR IN THE ALTERNATIVE TO AFFIRM

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IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1974

No. 73-6935

SEPTEMBER TERM, 1974

MARCEL YOUAKIM and LINDA YOUAKIM, individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Plaintiffs-Appellants,

vs.

JEROME MILLER, individually and as Director of the DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Defendants-Appellees.

MOTION TO DISMISS, OR IN THE ALTERNATIVE TO AFFIRM

The appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, respectfully move this Honorable Court to dismiss the appeal herein or in the alternative, to affirm the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, on the grounds that the appeal fails to present a substantial question for adjudication and that the question presented is so insubstantial as not to warrant further argument.

OPINION BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 374 F. Supp. 1204 (1974), and is reproduced in Appendix A of appellant's jurisdictional statement.

JURISDICTION

These proceedings were instituted when the appellants filed a class action in the United State District Court for the Northern District of Illinois, Eastern Division, pursuant to 28 U.S.C. §§ 1343 (3), (4), 1281, and 1284. Appellants sought injunctive relief in accordance with their claim under the Civil Rights Act (42 U.S.C. § 1983), contending that the foster home provisions of the Illinois Child Car Act, Ill. Rev. Stat., 1971, ch. 23, §§ 2212.05, 2212.17 and 5005 were unconstitutional.

The three-judge district court convened to hear this matter granted defendant-appellees' Motion to Dismiss the action on February 28, 1974. Plaintiffs filed their Notice of Appeal on April 23, 1974.

Appellants have invoked the jurisdiction of this Court to review the decision of the three-judge district court by virtue of 28 U.S.C. §§ 1253 and 2281.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment XIV;
Ill. Rev. Stat. (1971), ch. 23, § 2212.05;
Ill. Rev. Stat. (1971), ch. 23, § 2212.17;
Ill. Rev. Stat. (1971), ch. 23, § 5005;
Ill. Rev. Stat. (1971), ch. 23, § 4-1.2;
42 U.S.C. § 601;
42 U.S.C. § 603 (a) (1) (B);
42 U.S.C. § 606;
42 U.S.C. § 608;
45 C.F.R. § 233.10;
45 C.F.R. § 233.110.

ARGUMENT

THE APPEAL IN THE PRESENT CASE SHOULD BE DISMISSED FOR FAILURE TO PRESENT A SUBSTANTIAL FEDERAL QUESTION OR, IN THE ALTERNATIVE, THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, SHOULD BE SUMMARILY AFFIRMED BECAUSE THE QUESTION PRESENTED IS SO INSUBSTANTIAL AS NOT TO REQUIRE FURTHER ARGUMENT.

In attempting to argue the merits of the present cause before this Court, appellants in effect seek to have this Court pass judgment on the wisdom of the Illinois State Legislature. To better understand this contention, and to manifest the failure of appellants to present a substantial federal question, a discussion of the challenged foster care program is necessary.

It is important to note at the outset that the challenged sections of the Illinois Child Care Act pertain to the regulation and licensing of facilities for child care and have no bearing on, or in any way determine, the policy of the State in granting or refusing foster care subsidy.

Appellants allege that the State of Illinois through the Department of Children and Family Services unlawfully discriminates against persons caring for foster children related to them by not subsidizing them at a rate equal to that which foster parents of unrelated children receive. While it is admitted that the State of Illinois has in fact established a different rate structure for payments

to relatives and non-relatives, the basis for this policy is unrelated to §§ 2212.05 and 2212.17 of the Child Care Act which appellants had requested the District Court to declare unconstitutional.

The Child Care Act does not constitute the legal basis for the State's policy in regards to payment of relatives. Within the State of Illinois, child welfare programs are administered by both the Department of Public Aid and the Department of Children and Family Services. Each of the Departments receives substantial federal funding to administer these programs and is governed by the Social Security Act (U.S.C. Title 42 § 601 et seq.) as well as the Rules and Regulations of the Department of Health, Education and Welfare (H.E.W.). The Department of Public Aid administers the Aid to Families with Dependent Children Program (A.F.D.C.) for parents and relatives caring for children in their homes, as defined by U.S.C. Title 42 § 606 (a), while the Department of Children and Family Services, through an interagency agreement with the Department of Public Aid, administers the smaller Aid to Families with Dependent Children-Foster Care Program (A.F.D.C.-F.C.) governed by U.S. Title 42 § 608 and 45 C.F.R. 233.110. Under the existing Illinois State Welfare plan, all children removed from their homes and placed under the guardianship of the State are eligible for A.F.D.C. payments based on the eligibility criteria of the home from which they were removed. This remains true even if such children are placed in the homes of relatives. As defined in U.S.C. Title 42 § 606 (a), they would still be eligible for payment under the A.F.D.C. program. However, if they are placed with strangers, the higher A.F.D.C.-F.C. foster care rate would be allowed. In Illinois, the average A.F.D.C. rate is approximately $63.00

per child per month, while the average foster care rate is $105.00 per child per month. The appellants and the class they represent are eligible, regardless of their financial circumstances, to receive that $63.00 payment. They are not eligible for the higher foster care rate, however, unless the relatives can show a need for such payment. (Illinois Department of Children and Family Services Placement Manual "Placement with Relatives," pp. 95-97, July, 1972—Appendix E of Appellant's Jurisdictional Statement). The Department is presently paying approximately 140 relatives the higher rate. It is a fact that all relatives are not eligible for this higher foster care rate which appellants contend constitutes invidious discrimination.

As outlined above, the State of Illinois' policy is based on its interpretations of the Social Security Act and as determined by H.E.W., and its desire to rationally care for the needy children of the State within the limited resources available for such care. The sections of the Child Care Act cited by appellants have no relevancy to the issue before this Court. Nothing in the Social Security Act or the Illinois Public Aid Code by which the Department of Children and Family Services administers A.F.D.C.-F.C., makes licensing a condition precedent to payment. The applicable sections requiring licensing *or approval* by the State Agency, are as follows:

Title 42 § 608 (in applicable part) reads as follows:

> For purposes of this Section, the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated *or has been approved, by* the agency of such State responsible for licensing homes of this type, *as meeting the standards established for such licensing;* and the

> term "child-care institution" means a non-profit private child-care institution which is licensed by the State in which it is situated *or has been approved,* by the agency of such State responsible for licensing *or approval* of institutions of this type, *as meeting the standards established for such licensing.* (Emphasis added)

Illinois Public Aid Code, Ill. Rev. Stat. 1971, Ch. 23, § 4-1.2:

> Living Arrangements — Parents — Relatives — Foster Care.) The child or children must (1) be living with his or their father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt, or other relative approved by the Illinois Department, in a place of residence maintained by one or more of such relatives as his or their own home, or (2) have been (a) removed from the home of the parents or other relatives by judicial order under the "Juvenile Court Act", approved August 5, 1965, as amended, (b) placed under the guardianship of a county superintendent of public aid or the principal administrative officer in the Division of Child Welfare of the Department of Children and Family Services, and (c) under such guardianship, or other guardianship authorized prior to the effective date of this 1969 Amendatory Act, placed in a foster family home or child care institution licensed pursuant to the "Child Care Act", approved July 10, 1957, as amended *or approved by that Department as meeting standards established for licensing under the Act.* A child so placed in foster care who was not receiving aid under this Article in or for the month in which the court proceedings leading to that placement were initiated may qualify only if he lived in the home of his parents or other relatives at the time the proceedings were initiated, or within 6 months prior to the month of

initiation, and would have received aid in and for that month if application had been made therefor. (Emphasis added)

Thus, it is clearly seen that the challenged sections of the Illinois Child Care Act are not determinative regarding any foster care payments. What the Act states is that persons related to children in their care under state guardianship are simply not subject to licensing, only to being approved as meeting standards for licensing. The Department of Children and Family Services does, in fact, approve many such homes; there are presently approximately 1500 families in this category caring for children under state guardianship within the State of Illinois. The Child Care Act does not control payment; it is an Act which has the purpose of regulating the quality of care children receive outside their own home. The legislature in enacting the Child Care Act, intended that homes caring for relatives' children did not require public monitoring. It was for this reason, and not any reason related to payment, that relatives' homes were excluded from licensing.

With this perspective in mind, it becomes clear that no substantial federal question is here presented.

In *Equitable Life Assurance Society of the U.S.* v. *Brown,* 187 U.S. 308, 311, 47 L. Ed. 190, 192 (1902), this Court said:

> . . . [T]he doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, *or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy,* the motion to dismiss will prevail. (Emphasis added).

See also, *Missouri Pacific Railway Co.* v. *Castle,* 224 U.S. 541, 56 L. ed. 875, 878 (1912). (Motion to Affirm).

It is respectfully submitted that the constitutional questions involving public welfare assistance programs have been so explicitly foreclosed by the decisions of this Court, as to leave no room for real controversy, and that appellees' motion to dismiss or in the alternative to affirm, should, therefore, be allowed. *Jefferson* v. *Hackney,* 406 U.S. 535, 32 L. ed. 2d 285 (1972); *Dandridge* v. *Williams,* 397 U.S. 471, 25 L. ed. 2d 491 (1970); *Ramos* v. *Montgomery,* 313 F. Supp. 1179 (1970), aff'd 400 U.S. 1003, 27 L. ed. 2d 618 (1971).

A.

The Illinois System Of Clarifying Assistance Based On Relationships Is A Rational System For Distributing Limited Welfare Funds And For Promoting The Policies Of The State.

In determining the constitutionality of the Child Care Act's application to appellants, there is an established proposition that the "prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 489, 99 L. ed. 563, 573 (1955). The rules for testing discrimination have been summarized as follows:

> 1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary.

> 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

Lindsey v. *National Carbonic Gas Co.*, 220 U.S. 61, 78-79, 55 L. ed. 369, 377 (1910) and the cases cited therein. Therefore, for the statutory distinction between related and unrelated foster parents to be constitutional, it need only be based on differences that are reasonably related to the purposes of the Child Care Act. *Morey* v. *Doud*, 354 U.S. 457, 1 L. ed. 2d 1485 (1957).

In reiterating the tests to be applied in these types of cases and affirming the principles of the above cited cases, this Court in *Dandridge* v. *Williams*, 397 U.S. 471 at 487, 25 L. ed. 2d 491 at 503 (1970), strongly stated the caution and restraint to be exercised in second-guessing a state legislature:

> We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this

> Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration, Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. Cf. Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 584-585, 57 S. Ct. 883, 889-890, 81 L. Ed 1279; Helvering v. Davis, 301 U.S. 619, 644, 57 S. Ct. 904, 909, 81 L. Ed. 1307.

See also, *Jefferson* v. *Hackney*, 406 U.S. 535, 32 L. ed. 2d 285 (1972).

The District Court accurately applied these principles and found several rational bases for the challenged classifications. *Youakim* v. *Miller*, 374 F. Supp. 1204 (1974). (reproduced in appellant's jurisdictional statement—Appendix A). Several more could be proffered but to do so would be unnecessarily burdensome to the disposition of this motion. Further, the District Court refused to judge the wisdom of the legislative scheme as was and is requested by appellants. The crux of the appellants' jurisdictional statement (pp. 7, 11) is that they are prepared to refute the wisdom of the legislature and prove that a better scheme could be devised. Instead of plainly disclosing that the classification challenged is arbitrary, as is required of them, appellants' disclosures tend to produce the belief that it rests upon a reasonable basis. This kind of argument certainly does not present a substantial federal question. Rather, it represents an attempt by appellants to have this Court engage in the exercise of a judicial function from which it has repeatedly and categorically refrained.

In their attempt to show that the question presented is substantial, appellants cite *Williams* v. *Wohlgemuth*, 366 F. Supp. 541 (W.D. Penn. 1973), aff'd. No. 73-1188, 42 U.S.L.W. 3551, as the "mirror image" of the case here presented and decided subsequent to the district court decision herein on appeal. There exists a fundamental factual distinction between that case and the case presented here that negates its applicability. In *Williams*, the regulations in question created a conclusive presumption that such persons in the plaintiff's class (unrelated adults not receiving assistance) were not eligible for general assistance, regardless of need. The plaintiff therein did not receive public assistance and by virtue of that fact alone the minor was refused any assistance. Therefore, public assistance was based on the status of the substitute parent and no conideration was given to the need of the minor. Under the Illinois State Welfare plan, all children removed from their homes are eligible for payment based on the eligibility criteria of the home from which they were removed. Therefore, it is the status and needs of the child that are the controlling factors in determining assistance and not the status of the substitute parent. Furthermore, no conclusive presumption operates in Illinois to deprive any child removed from his natural home of assistance. Rather, all such children are eligible for AFDC payments and are eligible for even further assistance if a need is present. Therefore, the invidious discrimination the Court found in *Williams* is totally absent from the facts and case presented here.

B.

The Illinois System Of Classifying Assistance Based On Relationship Is Consistent With The Social Security Act.

In administering the various acts pertaining to public aid and welfare, the State of Illinois has in effect created three classifications for welfare payments to children. These are (1) children in their own homes; (2) children in the home of relatives as defined in U.S.C. Title 42 § 606 (a); and (3) children in the home of strangers.

The thrust of appellants' argument here is that the challenged scheme of classification conflicts with the stated policies of the United States and of the State of Illinois to promote and strengthen the family unit wherever possible.

U.S.C. Title 42 § 601 provides in pertinent part:

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each state to furnish financial assistance and rehabilitation and other services, *as far as practicable under the conditions in such State,* to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives *to attain or retain capability for the maximum self-support and personal independence* consistent with the maintenance of continuing parental care and protection . . . (Emphasis added).

It is a legitimate interest of the State of Illinois, through the Department of Children and Family Services and the Administrator of this Act, and within the precepts of State and Federal statutory directives, to pro-

mote and seek the independence of families of whatever type from reliance on the State for support.

The encouragement of self-sufficiency is the object of every type of assistance program. This is not only to preserve the integrity of the State fiscal structure, which is a legitimate state interest, *Dandridge* v. *Williams*, 397 U.S. 471, 25 L. ed. 2d 491 (1970); 45 C.F.R. § 233.10, but also, and primarily for the benefit of families of a related nature, to attain and sustain a proper family structure so that the family unit should as much as possible be relieved from dependence on State support.

This interest in maintaining the independence of families is reflected in the Children and Family Services Act, Ill. Rev. Stat. 1971, ch. 23, § 5005 (2b) (d), which reads in pertinent part:

> The Department shall strive concerning provisions for day care centers to have an emphasis on services to children of recipients of public assistance where such service will allow training or employment of the parent toward achieving the goal of independence, and the care of children from families in stress and crisis whose members potentially may become or are in danger of becoming non-productive and dependent.

Hence, one of the primary interests of the Act is to promote the self-sufficiency of families and to have the State encourage the promotion of the independence of these families.

Nowhere in the Federal or State statutes is there a bar to payment to foster parents of related children. Nor is there provision in any of the statutes which denies the right of the pertinent State agency to promote the public interest, as visualized and perceived by the State, by providing for a different payment plan. Appellants ob-

ject to this difference, however, the statutes cited in support of their position destroy the foundation of their objection. In every interest cited, and in every guiding principle contained in U.S.C. Title 42, the Children and Family Services Act and the Juvenile Court Act, under which appellees must operate, the legislative intent clearly indicates that children ought to be placed, when their return to their natural home is rendered impossible, in the home of a relative, and only thereafter in the home of a stranger. This is *prima facie* evidence that the law considers relatives of a child on a nearly equal basis with natural parents. Hence, respecting payments, the State treats children in their own home and in the home of relatives equally except that if the relative home needs extra monetary resources to maintain the placement, payment will be made (I.D.C.F.S. Placement Manual, "Payment to Relatives" p. 97. See also 45 C.F.R. 233.10).

This policy is not inconsistent with the Social Security Act, but, as a matter of fact, is reflected in the Act. The definition of dependent child, U.S.C. Title 42 § 606 (a), places relatives in the same class and category as parents. Furthermore, the policy of placing relatives in the same class with parents is reinforced by U.S.C. Title 42 § 233.110 (a) (2) 111 (1972), which requires the Department to periodically review its casework plan for the purposes of *returning the child to the home from which it was removed or to prepare the child for placement with another relative.* This serves primarily to emphasize the fact that the Federal government recognizes the substantial equality of parents and relatives for the purpose of child care. The Department of Children and Family Services surpasses the mandate of the Social Security Act by paying relatives who need more money than is af-

forded by the A.F.D.C. rate and who can demonstrate this need.

The case of *Ramos* v. *Montgomery,* 331 F. Supp. 1179 (1970), aff'd. 400 U.S. 1003, 27 L. ed. 2d 618 (1971), though based on slightly different facts serves to foreclose controversy in this area. It not only affirmatively draws a distinguishing line between natural and foster parents but upholds the basis of rationality in such distinction, as is presented here. In the *Ramos* case, the plaintiff, a welfare mother, challenged the fact that her A.F.D.C. grant was less than the grant which could have been awarded a foster parent for the same child. The Court held that this was a rational classification and therefore, not discriminatory. The only factual distinction between the *Ramos* case and the present one is that a relative, rather than a parent was challenging the distinction. Since the Social Security Act itself and the Children and Family Services Act treat relatives and parents on an equal basis the *Ramos* case is sound precedent. Therefore the question presented, having been previously decided adversely to appellants, lacks the basic criterion of a substantial federal question for review. *Equitable Life Assurance Society of the U.S.* v. *Brown,* 187 U.S. 308, 47 L. Ed. 190 (1902).

CONCLUSION

For all these reasons appellees respectfully submit that the present appeal does not present a substantial federal question for adjudication and that the question upon which this cause is presented is so insubstantial as not to require any further argument. Appellees, therefore, respectfully move this Honorable Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in this cause by the United States District Court for the Northern District of Illinois, Eastern Division.

Respectfully submitted,

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* Mr. Bargiel was assisted in the preparation of this Motion by Jim E. Lavine, J.D. I.I.T.-Chicago-Kent College of Law.

APPENDIX

APPENDIX

§ 606. Definitions

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment.

(b) The term "aid to families with dependent children" means money payments with respect to, or (if provided in or after the third month before the month in which the recipient makes application for aid) medical care in behalf of or any type of remedial care recognized under State law in behalf of a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care recognized under State law to meet the needs of the relative with whom any dependent child is living (and the spouse of such relative if living with him and if such relative is the child's parent and the child is a dependent child by reason of the physical or mental incapacity of a parent

or is a dependent child under section 607 of this title), and (2) payments with respect to any dependent child (including payments to meet the needs of the relative, and the relative's spouse, with whom such child is living, and the needs of any other individual living in the same home if such needs are taken into account in making the determination under section 602(a)(7) of this title) which do not meet the preceding requirements of this subsection, but which would meet such requirements except that such payments are made to another individual who (as determined in accordance with standards prescribed by the Secretary) is interested in or concerned with the welfare of such child or relative, or are made on behalf of such child or relative directly to a person furnishing food, living accommodations, or other goods, services, or items to or for such child, relative, or other individual but only with respect to a State whose State plan approved under section 602 of the title includes provision for—

(A) determination by the State agency that the relative of the child with respect to whom such payments are made has such inability to manage funds that making payments to him would be contrary to the welfare of the child and, therefore, it is necessary to provide such aid with respect to such child and relative through payments described in this clause (2);

(B) undertaking and continuing special efforts to develop greater ability on the part of the relative to manage funds in such manner as to protect the welfare of the family;

(C) periodic review by such State agency of the determination under clause (A) to ascertain whether conditions justifying such determination still exist, with provision for termination of such payments if they do not and for seeking judicial appointment of

a guardian or other legal representative, as described in section 1311 of this title, if and when it appears that the need for such payments is continuing, or is likely to continue, beyond a period specified by the Secretary;

(D) aid in the form of foster home care in behalf of children described in section 608(a) of this title; and

(E) opportunity for a fair hearing before the State agency on the determination referred to in clause (A) for any individual with respect to whom it is made;

(c) The term "relative with whom any dependent child is living" means the individual who is one of the relatives specified in subsection (a) of this section and with whom such child is living (within the meaning of such subsection) in a place of residence maintained by such individual (himself or together with any one or more of the other relatives so specified) as his (or their) own home.

(d) The term "family services" means services to a family or any member thereof for the purpose of preserving, rehabilitating, reuniting, or strengthening the family, and such other services as will assist members of a family to attain or retain capability for the maximum self-support and personal independence.

(e) (1) The term "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a) (1) of this section in a place

of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment—

(A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

(B) such services as may be specified by the Secretary;

but only with respect to a State whose State plan approved under section 602 of the title includes provision for such assistance.

(2) Emergency assistance as authorized under paragraph (1) may be provided under the conditions specified in such paragraph to migrant workers with families in the State or in such part or parts thereof as the State shall designate. Aug. 14, 1935, c. 531, Title IV, § 406, 49 Stat. 629; Aug.10, 1939, c. 666, Title IV, § 403, 53 Stat. 1380; Aug. 28, 1950, c. 809, Title III, Pt. 2 § 323(a), 64 Stat. 551; Aug. 1, 1956, c. 836, Title III, §§ 321, 322, 351(b), 70 Stat. 850, 855; July 25, 1962, Pub. L. 87-543, Title I, §§ 104(a) (3) (D), 108(a), 109, 152, 156(b), 76 Stat. 185, 189, 190, 206, 207; Oct. 13, 1964, Pub. L. 88-641, § 2(a), 78 Stat. 1042; July 30, 1965, Pub. L. 89-97, Title IV, § 409, 79 Stat. 422; Jan. 2, 1968, Pub. L. 90-248, Title II, §§ 201(f), 206(b), 207(a), 241(b) (5), 81 Stat. 880, 893, 916.

No. 73-6935

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IN THE SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1974

MARCEL YOUAKIM and LINDA YOUAKIM, ET AL., APPELLANTS

v.

JEROME MILLER

ON APPEAL TO THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

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MARCEL YOUAKIM and LINDA YOUAKIM, ET AL., APPELLANTS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to this Court's order of October 15, 1974, inviting the Solicitor General to present the views of the United States.

STATEMENT

The State of Illinois has a policy whereby it makes a substantial foster care (AFDC-FC) payment pursuant to the federal Aid to Families with Dependent Children (AFDC) program when children are placed in a foster home with persons who are not related, pursuant to a judicial determination that the children's original home is unsuitable for them. If, however, the persons providing the foster care in such circumstances are related to the children, Illinois denies them foster care payments, unless they can show a need therefor. The foster family may qualify for AFDC payments, which in Illinois are less than the AFDC-FC payments.

Appellants in this case are foster parents caring for children related to them, and the children themselves. They brought a class suit in the United States District Court for the Northern District of Illinois, contending that the Illinois practice of providing higher payments when the foster parents are unrelated to the children violates the Social Security Act and the Equal Protection Clause. A three-judge district court rejected these contentions and dismissed the suit (J.S. App. A).

ARGUMENT

We submit that the Illinois policy of denying foster care AFDC benefits for children living with relatives is invalid because it conflicts with specific criteria for eligibility set forth in the Social Security Act; and that the validity of this practice is a substantial question in the administration of the Social Security Act which warrants plenary review by this Court.

1. In order to qualify for AFDC benefits, a child must be a "dependent child" as defined in 42 U.S.C. 606(a). Under that definition, a child is dependent if it (1) has been deprived of parental support for specified reasons, (2) is living with a relative as defined in the section, and (3) is under 18 (or, in certain circumstances 21) years of age.[1/] The AFDC foster care program is provided under 42 U.S.C. 608, which expanded the definition of "dependent child" to include certain

---

1/ 42 U.S.C. 606(a) provides:

> When used in this part---
>
> (a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or
> (Continued)

children who, even though not living with relatives, live in foster homes as a result of a judicial determination that they should be removed from their regular homes.[2/]

1/ (Continued)

> physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocation or technical training designed to fit him for gainful employment.

2/ 42 U.S.C. 608(a) provides:

> Effective for the period beginning May 1, 1961 --
>
> (a) the term "dependent child" shall, notwithstanding section 606(a) of this title, also include a child (1) who would meet the requirements of such section 606(a) or of section 607 of this title except for his removal after April 30, 1961, from the home of a relative (specified in such section 606(a)) as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child, (2) whose placement and care are the responsibility of (A) the State or local agency administering the State plan approved under section 602 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of such State plan has made an agreement which is still in effect and which includes provision for assuring development of a plan, satisfactory to such State agency, for such child as provided in paragraph (f)(1) and such other provisions as may be necessary to assure accomplishment of the objectives of the State plan approved under section 602 of this title, (3) who has been placed in a foster family home or child-care institution as a result of such determination, and (4) who (A) received aid under such State plan in or for the month in
> (Continued)

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A child is eligible for AFDC-FC if it (1) is a "dependent child" as defined in Section 608(a); (2) lives in a "foster family home" or a "child-care institution" as a result of a judicial determination that the child's home is not suitable for him (Section 608(f)); and (3) meets other conditions of Section 608, not in issue here.

Appellants concededly meet all of these conditions, and therefore qualify for AFDC-FC. The additional requirement imposed by the State of Illinois that children are entitled to AFDC-FC only if the foster home in which they are living is maintained by non-relatives is contrary to the decisions of this Court which have prohibited the states from narrowing specific federal eligibility criteria without congressional authorization. Townsend v. Swank, 404 U.S. 282, 286; Carlson v. Remillard, 406 U.S. 598, 601; King v. Smith, 392 U.S. 309, 333.[3/]

3/ (Continued)

> which court proceedings leading to such determination were initiated, or (B)(i) would have received such aid in or for such month if application had been made therefor, or (ii) in the case of a child who had been living with a relative specified in section 606(a) of this title within 6 months prior to the month in which such proceedings were initiated, would have received such aid in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made therefore.

3/ There have been several cases in which the state has been permitted to impose additional requirements as conditions of eligibility for AFDC. Snell v. Wyman, 393 U.S. 323, affirming 281 F. Supp. 853 (S.D. N.Y.); Wyman v. James, 400 U.S. 309; Charleston v. Wohlgemuth, 405 U.S. 970, affirming 332 F. Supp. 1175 (E.D. Pa.); New York State Department of Social Services v. Dublino, 413 U.S. 405. The requirements upheld in those cases, however, were designed to further the purposes of the Social Security Act, such as seeking employment, permitting a home visit by social workers, or agreeing to reimburse the state for assistance (Continued)

Appellees argue (Motion to Dismiss or Affirm, p. 15) that because the Social Security Act "indicates that children ought to be placed, when their return to their natural home is rendered impossible, in the home of a relative, and only thereafter in the home of a stranger * * * the law considers relatives of a child on a nearly equal basis with natural parents." From this they conclude that the state may treat children in foster homes of relatives as if they were still living with their parents, and therefore deny them foster-care payments. The argument is a non sequitur.

As already noted, the only qualification for foster-care benefits is that the child be "dependent" and that it be living in a foster home or a child-care institution as the result of a judicial determination that its own home is unsuitable. Those conditions were satisfied here, and the child is therefore entitled to foster-care benefits.

Appellees' argument, rather than supporting their conclusion, points in the opposite direction. The denial of foster-care benefits to children living with relatives is likely to make relatives unwilling to accept the children and lead to the placement of children in foster homes of non-relatives. This result would be inconsistent with the policy stated in 42 U.S.C. 601 that the AFDC program is aimed at "encouraging the care of dependent children in their own homes or in the homes of relatives * * *." Indeed, this policy was the primary basis upon which a

---

3/ (Continued) received if funds therefor become available. Here, on the other hand, the Illinois system excludes from benefits a class of children who meet the statutory qualifications and, as shown infra, (p. 5), the disqualifying condition of living with a relative is opposed to rather than in furtherance of the design of the Social Security Act.

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district court invalidated, as inconsistent with the Social Security Act, the practice of South Dakota of denying foster-care payments for children living with relatives. Clampett v. Madigan, No.CIV73-4018, decided May 24, 1973 (D. S.D.). See, also, Jackson v. Ohio Department of Public Welfare, No. C72-182, decided April 17, 1972 (N.D. Ohio).

Appellants contend that Ramos v. Montgomery, 331 F. Supp. 1157 (S.D. Cal.), affirmed, 400 U.S. 1003, controls this case. That case, however, merely held that where a child was not eligible for foster-care benefits because he did not meet the condition in Section 608 that he had been removed from his home as a result of a judicial determination, the foster parents were not entitled to receive foster-care payments. The present case, however, involves the totally different situation where the child does qualify for foster-care payments but the state denies those payments because relatives provide the foster care.

2. The question is an important one in the administration of the Act. We are informed by the Department of Health, Education and Welfare that in addition to Illinois, 13 other states currently deny full foster-care payments to foster parents caring for related children. Approximately 28 percent of AFDC recipients are living in those states. The issue thus has substantial impact, and warrants definitive resolution by this Court.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

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Supreme Court, U. S.
FILED
JUN 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 73-6935

MARCEL YOUAKIM and LINDA YOUAKIM individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Plaintiffs-Appellants,

v.

JEROME MILLER individually and as Director of the DEPARTMENT OF CHILDREN AND FAMILY SERVICES and the DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BRIEF FOR APPELLANTS

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IN THE

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No. 73-6935

MARCEL YOUAKIM and LINDA YOUAKIM individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Plaintiffs-Appellants,

v.

JEROME MILLER individually and as Director of the DEPARTMENT OF CHILDREN AND FAMILY SERVICES and the DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is

officially reported at 374 F. Supp. 1204 (1974). It is also reproduced in the Appendix 50-61.

JURISDICTION

This is a direct appeal to this Court pursuant to 28 U.S.C. § 1253 from the final decision of the three-judge United States District Court for the Northern District of Illinois, Eastern Division, which was convened in compliance with 28 U.S.C. § § 2281, 2284.

The court below had jurisdiction pursuant to 28 U.S.C. § 1343(3)(4) and 42 U.S.C. § 1983, in a suit to enjoin the operation of that part of the Illinois statutory foster care scheme which denies foster care payments to Appellant foster parents and foster children for the sole reason that they are related to one another while all the foster children who live with strangers automatically get the full subsidy.

The action was filed on March 13, 1973. On cross motions for summary judgment the District Court decided on February 28, 1974: first, the cause was properly maintained as a class action. Second, the Eleventh Amendment did not bar the suit. Third, the Illinois foster care scheme did not violate the Equal Protection Clause or the Social Security Act. The court entered summary judgment for defendants without a trial. *Youakim v. Miller*, 374 F. Supp. 1204. Plaintiffs-Appellants appeal only the third part of the February 28, 1974 decision.

The Notice of Appeal was filed on April 23, 1974.

In February 1975, pursuant to the Supreme Court's order of October 15, 1974, the Solicitor General filed a

brief in support of the Court's jurisdiction and in support of Appellants' contention that the Illinois scheme violates the Social Security Act.

On March 17, 1975 the Supreme Court noted probable jurisdiction and granted Plaintiffs' motion to proceed *in forma pauperis*.

QUESTIONS PRESENTED

I. THE ILLINOIS FOSTER PAYMENT SCHEME DENIES FEDERAL FOSTER CARE PAYMENTS TO CHILDREN WHO ARE PLACED IN APPROVED FOSTER HOMES MAINTAINED BY RELATIVES. DOES THIS DENIAL VIOLATE THE SOCIAL SECURITY ACT, 42 U.S.C. § § 601, 608 AND THE SUPREMACY CLAUSE, U.S. CONSTITUTION, ARTICLE VI, SECTION 2?

II. THE ILLINOIS FOSTER PAYMENT SCHEME CREATES TWO CLASSES OF PERSONS FOR FOSTER CARE BENEFITS: FOSTER CHILDREN LIVING WITH FOSTER PARENTS WHO ARE STRANGERS AND FOSTER CHILDREN LIVING WITH FOSTER PARENTS WHO ARE RELATED TO THEM. FULL FOSTER CARE PAYMENTS ARE MADE TO THE FORMER CLASS AND NONE ARE MADE TO THE LATTER. DOES THIS CLASSIFICATION VIOLATE THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, AND SPECIFICALLY THE EQUAL PROTECTION CLAUSE?

STATUTES AND REGULATIONS INVOLVED

I. State Statutes and Regulations

The state statutes challenged provide for full foster care payments to wards of the state—foster children—

who are placed in licensed foster homes maintained by strangers. But the same statutes deny these payments to children placed in approved foster homes maintained by persons who happen to be related to them. Ill. Rev. Stats., Ch. 23 § 2212.05 and § 2212.17 (1971), provide in relevant part:

> "Facility for child care" or "child care facility" means any person, . . . who or which receives or arranges for care or placement of one or more children, *unrelated* to the operator of the facility. Dept. of Children and Family Services Act. Ill. Rev. Stats., Ch. 23, § 2212.05 (1971). [Text: App. 21].
>
> "Foster family home" means a facility for child care in residences of families who receive no more than 8 children *unrelated* to them, . . . Ch. 23, § 2212.17 [Text: App. 21, 22]. (emphasis added)

The general powers and duties of the Illinois Department of Children and Family Services (DCFS) and its Director, Defendant-Appellee Jerome G. Miller, are set out in Ill. Rev. Stats., Ch. 23, § 5001 and § 5005 (1971). The Department was created to provide social services to children and their families (§ 5001).

> The Department shall establish and maintain tax-supported child welfare services and extend and seek to improve voluntary services throughout the state, to the end that services and care shall be available on an equal basis throughout the state to children requiring such services (§ 5005, ¶ 5) [Text: App. 23-29].

Under Illinois law the only persons who have a legal duty to support their relatives are natural and adoptive parents. Ill. Rev. Stats., Ch. 23 § 2-11 (1971). [Text: Supp.S-1].

Section 4-1.2 of the Illinois Welfare Code provides for payment for foster care. Ill. Rev. Stats., Ch. 23 § 4-1.2 (1971). [Text: Supp.S-1].

Certain DCFS regulations are concerned with foster home licensing and payment. See Illinois DCFS *Placement Manual* Ch. 3, § 5, at p.97. These regulations contain the statement: "The Department [of Children and Family Services] has no statutory authority to pay relatives for the care of children." [Text: App. 34-37 at 36].

In its Memorandum of Decision, the District Court correctly observed that these regulations did no more than summarize what is apparent on the face of the statutes. 374 F. Supp. at 1205, note 1. The District Court accordingly addressed itself only to the challenged statutes.

II. Federal Constitution, Statutes and Regulations

This case involves the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Not challenged, but relevant to this case is Title IV of the Social Security Act, 42 U.S.C. §§ 601, 602, 603(2)(1)(B)(ii), 606, and 608.

Section 401, 42 U.S.C. § 601, mandates a clear national policy of encouraging the care of dependent children in their own homes or in the homes of relatives whenever possible. All Federally supported child welfare plans must be designed to help maintain and strengthen family life, and to help such parents or relatives. [Text: App. 28, 29].

Section 402, 42 U.S.C. 602 sets out the requirements for state welfare plans, including that each state provide for aid to families with dependent children in the form of foster care. § 602(a)(20). [Partial Text: Supp.S-2].

Section 403(a)(1)(B)(ii), 42 U.S.C. § 603, states the formula for computing the Federal share of assistance payments for foster families. [Partial Text: Supp.S-2].

Section 406, 42 U.S.C. § 606 defines those persons eligible for benefits under Title IV of the S.S.A. [Text: Supp. S-2, S-3].

Section 408, 42 U.S.C. § 608 is the blueprint for the federal foster care program. It provides for federal funds to be paid to children cared for "in the foster family home of *any individual.*" 42 U.S.C. § 608(b)(1). (emphasis added.) There are no exclusions. [Text: App. 31].

Section 425, 42 U.S.C. § 625 defines federally subsidized "child welfare services" as:

> public social services which supplement, or substitute for, parental care and supervision for the purpose of . . .
>
> (4) Otherwise protecting and promoting the welfare of children, including the strengthening of their own homes where possible, or where needed, the provision of adequate care of children away from their homes in foster family homes or day care or other child-care facilities.
>
> [Text: App. 28-29].

Also not challenged but involved in this case are 45 C.F.R. § § 233.10 and 233.110.

Section 233.10 sets out general provisions regarding coverage and conditions of eligibility in financial assistance programs. It requires that "groups selected

for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act." [Text: Supp.S-5].

Section 233.110 sets out certain Regulations pertaining to the Federal AFDC-FC program. [Text: Supp.S-7].

Most relevant to this case is a recent H.E.W. Program Instruction to all state agencies which administer state welfare plans, including AFDC-FC programs. APA-PI-75-9. October 25, 1974. [Reproduced in Part I - B *infra.*]

STATEMENT OF THE CASE

In May 1969 the juvenile court in Cook County, Illinois, found that the four minor Plaintiffs could not be cared for in their own home. They were declared wards of the State of Illinois, and the Illinois Department of Children and Family Services (DCFS) and its Director, Dr. Jerome Miller, Defendants-Appellees, were appointed their guardian. DCFS placed the children in various licensed foster care institutions. At that time all the children lived with strangers and received full federally subsidized foster care payments under the state's Aid to Families with Dependent Children–Foster Care (AFDC-FC) program. 42 U.S.C. § 608.

In January 1972, Plaintiff-Appellant Timothy Robertson, age 8, experienced some problems in the stranger's

home where he then lived. Defendant Miller or others in DCFS decided that Timothy's best interest would be served by removing him to a new foster placement in the home of his adult sister, Linda, and her husband, Marcel Youakim, who were willing to accept him as their foster child. DCFS accordingly inspected the Youakims' home, found that it complied with all the standards for a licensed foster home, gave its approval, and Timothy became the Youakims' foster child.

DCFS requires that all foster parents sign a contract, the Illinois Foster Home Placement Agreement, which spells out the obligations of the foster parents to children placed with them. The Youakims did sign such an Agreement, but on their copy the word "Foster" and the sections which provide for AFDC-FC payments were crossed out. [Ex. I to Complaint. App. 18-20] The Youakims' obligations as foster parents are identical to those of all other foster parents.

The DCFS placement worker then told them that they would not receive regular foster care payments on Timothy's behalf. When the Youakims asked the reason why Timothy's foster care payments were terminated, the caseworker explained that Illinois law and policy deny foster care payments to children who are placed in the homes of foster parents related to them. Timothy still moved into the Youakims' home, where he remains today.

In May 1972, DCFS removed Timothy's sister, Plaintiff-Appellant Mary Lou Robertson, age 10, from the home of the strangers with whom she was then placed, and the Youakims likewise accepted her for foster care. Because of frequent moves Mary Lou had been considered a problem child, but since placement

with their related foster parents both Mary Lou and Timothy have been and remain happy and well adjusted.

When DCFS and its Director, duty-bound to act in the best interests of their wards, removed Timothy and Mary Lou from the foster homes operated by strangers and placed them in the approved foster home of their sister and her husband, which is, in fact and by law the best possible placement [Complaint ¶¶25-27. App. 11], Defendants-Appellees terminated the foster care (AFDC-FC) subsidy payments. They claim the law dictates the cutoff.

Thereafter the Youakims learned that they could apply for regular AFDC payments for their foster children, as can any person who takes in an indigent relative. For some time Timothy and Mary Lou received about $63.00 per month in regular AFDC funds. When they lived with strangers they each received about $105.00 per month from the state's AFDC-FC program.[1]

The benefits were cut off only when they were placed in the best possible home. The cutoff was

[1] In their affidavits in support of their motion for summary judgment, Defendants alleged that there are occasional exceptions to the general policy whereby the DCFS may allow larger payments to children living with foster parents related to them. In the case of these exceptions, they say that monthly payments in excess of the regular AFDC rate ($63.00) up to a maximum equal to the full foster care rate ($105.00) may be available if the related foster *parents* can demonstrate sufficient need. About 140 children are designated exceptions [App. 42-44]. There are no rules for the administration of these exceptions to policy, nor are there standards to determine "need." Members of the class Plaintiffs-Appellants represent are not generally aware that these occasional "exceptions to policy" are available.

automatic and unrelated to need. The amount of payment to each foster child under the state's AFDC-FC program is uniform regardless of the financial status of the foster home. The $63.00 AFDC payment Plaintiffs received was not conditioned on their status as foster children or state wards, which the regular AFDC program does not recognize. That program considers them to be just indigent children who happen to be living with relatives. 42 U.S.C. § 607(a). Illinois as a general policy excludes otherwise eligible wards of the state–foster children–from the AFDC-FC program if they are placed with relatives.

Since they undertook to care for their foster children, Marcel and Linda Youakim have incurred great personal expense and debt. They fear they will not long be able to continue paying to help support their foster children, whom the state alone is duty-bound to support. They have gone through a complex, difficult, embarrassing and stigmatizing process of application for straight AFDC funds. They experienced difficulties in getting the regular $63.00 AFDC payments for their foster children. [Complaint: ¶¶28, 29, 30, 33. App. 12]

The Youakims and all of the named Plaintiffs-Appellants believe that the best interests of all four children would be served if they could all live together in a family setting. The state's refusal to grant foster care payments makes this impossible. Sherry Robertson, age 15, continues to live with unrelated foster parents, where she receives the full foster care subsidy of $105.00 per month. Larry Robertson, age 13, remains in an orphanage, at an institutional cost far greater than the full foster care rate of $105.00 per month. [Complaint: ¶30. App. 12].

In order to participate in the federal public assistance programs, Illinois must submit a State Welfare Plan to the U.S. Department of Health, Education and Welfare. Its plan must conform to the requirements of Section 402 of the Social Security Act, 42 U.S.C. §602 [Supp. S-2], and must include descriptions of all of the types of programs a state must provide. The foster care program (AFDC-FC) is one such program.

Of the $105.00 per month Illinois normally pays foster parents for the care of the state wards placed with them, Plaintiffs believe that one half or more is paid by the federal government. The state may pay the federal foster care program funds (AFDC-FC) to *any individual* whose home is approved and who accepts a state ward–foster child–for care. 42 U.S.C. §608(b).

Illinois, like many states, has a chronic shortage of foster homes. Of Defendants-Appellees' twenty-thousand-plus wards only about 1500 are placed in the approved foster homes maintained by their relatives. The rest live in the homes of strangers or in institutions.

In Illinois only natural or adoptive parents are responsible for the support of children. Ill. Rev. Stats., Ch. 23 §2-11 (1971). [Supp.S-1] Once the court declares a child to be a ward of the state, it must act in his best interests. Ill. Rev. Stats., Ch. 37 §701 ff. (1971) [App. 27, 30]. The child has a right to full state support adequate to meet his needs and at a level equal to that of all other state wards. The state can look to no other relatives to support the children.

Appellants allege that the bar to payment of AFDC-FC funds to children living with foster parents related to them is an attempt by Illinois to engraft an

additional eligibility criterion onto the federal scheme. The imposition of this additional criterion has the effect of separating children from their relatives. Illinois' scheme does not put its foster children back together with their families; it pulls them apart.

Illinois should make foster care payments to its wards living with related foster parents, as the federal law requires. Appellants have alleged that many more of the state's children would be living with their relatives if the payments they seek were available. Some children who are now institutionalized and labeled "hard to place" would be removed from institutional care to the homes of their relatives.

Plaintiffs brought a civil rights class action under 42 U.S.C. §1983 in the U.S. District Court for the Northern District of Illinois. They alleged the Illinois scheme violates equal protection and supremacy. A three-judge court was convened.

On cross motions and affidavits for summary judgment the District Court decided on February 28, 1974 that: First, the action could be maintained as a class. Second, the Eleventh Amendment did not bar the suit. Third, the Illinois foster care scheme, though concededly discriminatory, did not violate the Equal Protection Clause or the Social Security Act, and accordingly the suit to enjoin the operation of the statute was dismissed without trial. The Plaintiffs appeal only the third part of the February 28, 1974 decision.

The District Court disposed of the supremacy claim with its observation that

> Far from being inconsistent with the federal scheme, the Illinois scheme in general seems to parallel it. The federal statute authorizes aid to the

> natural parents and relatives of dependent children in one section, 43 U.S.C. §606, and aid to foster children in another, 42 U.S.C. §608. Additionally, more money is allocated under the federal plan to foster care payments than to regular ADFC payments. 42 U.S.C. §603(a)(1)(B); see *Ramos v. Montgomery, supra,* 313 F. Supp. at 1182. Thus the federal statute makes the same classification as the Illinois statute.
>
> *Youakim v. Miller,* 374 F. Supp. 1204 at 1210 [App. 59-60].

The District Court erred in its determination that the Social Security Act makes "foster parents" and "relatives" mutually exclusive categories. [See Part I *infra.*]

The lower court gave little attention to what is central to the case: the problem of the difference between the AFDC-FC payment of $105.00 and the regular AFDC payment (which was not designed for children in foster care) of $63.00 per month. Throughout its opinion, the District Court was more concerned with the rights and economic interests of the foster *parents,* than with the foster children.

All the state's foster children have equal needs, equal claims to state support, the right to live with their relatives whenever possible, and the expectation that the state will act in their best interests. The District Court recognized the possibility of the violation of this right, but did not frame a remedy:

> Some related foster parents may not be able to afford the responsibility of caring for additional children, but the state argues that the scheme was not enacted to alleviate this problem, and from the fact that payments are not based on the relative

wealth of the foster parents, this contention is borne out.

Id. at 1208 [App. 56,57]

The District Court then in a footnote added its opinion that the possibility of foster children being kept apart from their relatives was lessened by the availability of the regular, much smaller AFDC payments. *Id.* at 1208 [App. 56]. But no evidence was taken.

The lower court relied on the case of *Ramos v. Montgomery*, 313 F. Supp. 1179 (S.D.Cal. 1970), aff'd 400 U.S. 1003, 91 S. Ct. 572 (1971), to dispose of the equal protection claim. The District Court would take the. legal duty of *parents* to make sacrifices for their children and make it a binding moral duty of non-responsible relatives. The difference between the $105.00 and $63.00 would be subsidized by relatives who felt a moral duty to undertake the state's obligation. *Id.* at 1209, [App. 57-58].

As the case involves an important question of interpretation of the Social Security Act, the Supreme Court on October 15, 1974 ordered the Solicitor General to file an *amicus* brief. 95 S. Ct. 36. In his February 1975 brief, the Solicitor, on behalf of the United States and H.E.W., argued that Illinois' scheme violates the Social Security Act and urged the Court to take jurisdiction and reverse.

The Court noted probable jurisdiction on March 17, 1975. 95 S. Ct. 1389. Plaintiffs-Appellants respectfully file this brief on May 31, 1975. They respectfully urge the Court to reverse the District Court's decision and to remand the case with instructions to enter summary

judgment for Plaintiffs, or in the alternative, to enter a proper discovery order and set the case for trial.

SUMMARY OF ARGUMENT

I. The Illinois practice of paying some of its foster children the full, federally subsidized foster care payment while it denies the payments to its otherwise eligible foster children who live with foster parents related to them violates the Social Security Act and Supremacy Clause.

The definition of foster family home that appears in the Illinois Statute differs from that of the Social Security Act in that it adds the term "unrelated" to the definition of operators of foster homes. Illinois thus denies full federally subsidized foster care payments to children placed in approved foster homes maintained by relatives.

The Social Security Act is the supreme law of the land. The states which participate in federal categorical assistance programs have great discretion to define level of payment and standard of need. But the federal law defines eligibility. The state cannot exclude a group of persons who are eligible according to the federal law.

Plaintiffs-Appellants, who are foster children placed in a State-approved foster home maintained by their adult sister and her husband, are eligible under the federal law but barred by the Illinois law and policy.

A. The plain meaning of the Social Security Act indicates that the Plaintiffs-Appellants are eligible for AFDC-FC payments. Absent a clear indication in the Act itself or in the legislative history which indicates it

was the intent of Congress to allow the States to restrict federally defined eligibility the plain meaning of the statute must be given effect.

B. H.E.W. has taken the same position as Plaintiffs. The Solicitor General filed a brief in this case wherein he argued for reversal on behalf of H.E.W. In October 1974, H.E.W. issued a Program Instruction to all state welfare agencies wherein it specifically directed that children who are placed with related foster parents are to receive full AFDC-FC payments.

C. The legislative history and overall purpose of the Social Security Act indicate that Congress intended the foster care payments to be made to relatives. Illinois' denial of the payments is contrary to the overall purpose of the Act, which is to strengthen family life. Illinois' practice does not put families back together. It pulls them apart.

The District Court erred in its finding that the Illinois foster care payment scheme does not violate the Social Security Act. The state law is not served by the possible availability of much lower regular AFDC payments from a different fund.

II. The Illinois practice of denying payment to some of its foster children violates equal protection. It creates a sub-group of foster children who suffer invidious discrimination.

A. The Court should analyze the Illinois statute in the same way it has considered several recent equal protection challenges where personal rights or interests are involved. The Court should consider the characteristics of the class of children invidiously discriminated against, and the weighty and important interest of the children in maintaining and strengthening whatever

family associations they have, and it should balance them against the overall legitimate state interests advanced. Here the purported state interest is slight or nonexistent. In fact the effect of the scheme is contrary to the overall state interest in strengthening families. The Court should give close scrutiny and find the scheme violates equal protection.

B. The District Court erred in its application of the "minimum scrutiny" test to the Illinois law. The classification that children who live in state-approved foster homes operated by their relatives are ineligible for payments is not rationally related to any legitimate state interest. The overall state interest is to service and strengthen *families.* But the Illinois scheme pays a premium for placement with strangers. It is irrational, contrary to the legislative purpose, and violates equal protection.

The Court should reverse and enter summary judgment for Plaintiffs.

ARGUMENT

I.

THE ILLINOIS FOSTER PAYMENT SCHEME DENIES FEDERAL FOSTER CARE PAYMENTS TO CHILDREN WHO ARE PLACED IN APPROVED FOSTER HOMES MAINTAINED BY RELATIVES. THIS DENIAL VIOLATES THE SOCIAL SECURITY ACT, 42 U.S.C. §§601, 608 AND THE SUPREMACY CLAUSE, U.S. CONSTITUTION ARTICLE VI, SECTION 2.

Introduction

The Constitution and laws of the United States are the supreme law of the land. All states are bound by them. States may not enact or execute laws or regulations which are contrary to the federal law and the policies therein stated.

In the area of federally subsidized categorical assistance benefits the Social Security Act is supreme. As a condition of its participation in the federal funding, each state must comply with the requirements of the Act and regulations. *King v. Smith*, 392 U.S. 309, 88 S. Ct. 2128 (1968); *Lewis v. Martin*, 397 U.S. 552, 90 S. Ct. 1282 (1970); *Townsend v. Swank*, 404 U.S. 282, 92 S. Ct. 502 (1971); *Carleson v. Remillard*, 406 U.S. 598, 92 S. Ct. 1932 (1972); *VanLare v. Hurley*, 43 USLW 4502 (May 19, 1975).

In each of these cases the state attempted to limit eligibility by defining a term in a manner inconsistent with the federal law. An Alabama law attempted to include "substitute father" in the federal definition of

"parent." *King v. Smith*, supra. An Illinois law attempted to exclude colleges and universities from the federal definition of "institutions of higher education." *Townsend v. Swank, supra.* A California law attempted to exclude military service from the definition of "continued absence from the home." *Carleson v. Remillard, supra.* A New York law attempted to include the unproved but presumed contribution of a lodger in the definition of available income. *VanLare v. Hurley*, 43 USLW 4502 (May 19, 1975). And see *Rosado v. Wyman*, 397 U.S. 397, 90 S. Ct. 120 (1970).

The Illinois law attempts to exclude relatives from the definition of foster parents. This Court must correct the error just as it did in the other cases, and just as other federal courts have corrected similar attempts by other states which deny eligibility to a sub-group of foster children. *Clampett v. Madigan*, No. Civ. 73-4018 D. S. Dak. So. Div. (May 24, 1973). [Memorandum Decision attached: Supp. S-8]. *Jackson v. Ohio Department of Public Welfare*, No. C72-182 N.D. Ohio, (April 17, 1972).

In *Burns v. Alcala*, 95 S. Ct. 1180 (March 17, 1975), this Court declared the law applicable to all these cases:

> *King*, *Townsend*, and *Carleson* establish only that once the federal standard of eligibility is defined, a participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional.
>
> at 1184

The federal laws and regulations which set up the foster care program define and create a protected class of all children who have been removed from their

regular AFDC-homes by the juvenile court and who are thereafter placed in licensed or approved foster homes. 42 U.S.C. §608. The fact that some may be placed with foster parents who are related to them does not affect their eligibility.

To determine whether a state law or policy complies with or violates the Social Security Act, this Court traditionally looks to three sources:

A. The plain words and meaning of the Act.
B. The interpretation and advice of the Department of Health, Education and Welfare.
C. The legislative history and the overall purpose of the Act.

A. The plain meaning of the Act is that children placed in approved foster homes maintained by their relatives are eligible for full AFDC-FC payments; denial of thé payments violates the Act.

Section 408 of the Social Security Act, 42 U.S.C. §608 [App. 31-33], is the federal blueprint for the states' foster care programs. It contains concise definitions.

The last paragraph of Section 408 reads:

> For purposes of this section, the term "foster family home" means *a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing* homes of this type as meeting the standards established for such licensing; and the term "child-care institution" means a nonprofit private child-care institution which is licensed by the State in which it is

> situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing.
>
> (emphasis added)

Illinois defines the same terms differently in the statutes challenged in this action:

> "Facility for child care" or "child care facility" means any person, . . . who or which receives or arranges for care or placement of one or more children, *unrelated* to the operator of the facility. Dept. of Children and Family Services. Ill. Rev. Stats., Ch. 23, §2212.05 (1971).
>
> and
>
> "Foster family home" means a facility for child care in residences of families who receive no more than 8 children *unrelated* to them, . . . Ch. 23, §2212.17 (emphasis added)
>
> [Text: App. 21, 22]

The conclusion is inescapable. By inserting the words "unrelated to the operator of the facility" in its definition of the homes wherein eligible foster children can be placed, Illinois has engrafted an additional condition of eligibility onto the federal scheme. This attempt must meet with the same fate as the states' similar attempts in *Townsend, King, Carleson, supra.*

The Social Security Act does not authorize the Illinois exclusion of related foster homes.

Section 408, 42 U.S.C. §608, defines the homes in which state wards may receive federally subsidized foster care:

> 608(b) the term "aid to families with dependent children" shall . . . include also foster care in behalf

of a child described in paragraph (a) of this section–

(1) in the foster family home *of any individual*, whether the payment therefor is made to such individual or to a public or nonprofit private child-placement or child-care agency, . . .

(emphasis added)

No homes are excluded.[2] No other options are offered. The word "unrelated" appears nowhere in the federal definition.

Unlike other sections of the Act, where Congress specifically sought to exclude or include certain relatives other than parents from eligibility, (or to give the states the option to provide more limited coverage than the language of the Act) Section 408 permits payment to *any* approved foster home where the child

[2]This Court has made clearer what would seem already clear: when Congress writes "any" the word means literally "any"–i.e. an inclusive term which cannot be whittled down by the states. In *Shea v. Vialpando*, 416 U.S. 251, 94 S. Ct. 1746 (1974), the Court construed section 402(a)(7), 42 U.S.C. § 602, which reads:

" . . . as well as *any expenses* reasonably attributable to the earning of any such income. . ."

This Court said:

By its terms, § 402(a)(7) requires the consideration of "any" reasonable work expenses in determining eligibility for AFDC assistance. In light of the evolution of the statute and the normal meaning of the term "any," we read this language as a congressional directive that no limitation, apart from that of reasonableness, may be placed upon the recognition of expenses attributable to the earning of income at 1753.

Illinois must propose a tortured reading indeed in order to say that the term "any individual" excludes "any individual related to the child."

who is otherwise eligible (i.e. a court-declared ward of the state) can be placed.[3]

The Department of Health, Education and Welfare recently amended its regulations to comply with the law of the *King*, *Townsend* and *Carleson* cases, *supra*. The regulations, amended in July 1974, now narrowly and precisely define the times when a state plan may exclude groups of citizens from federal categorical assistance programs:

§233.10 General provisions regarding coverage and eligibility.

(a) State plan requirements.
A state plan under title I, IV-A, X, XIV, or XVI, of the Social Security Act must:

(1) Specify the groups of individuals, based on reasonable classifications, that will be included in the program, and all the conditions of eligibility that must be met by the individuals in the groups. The groups selected for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act. Under this requirement:

(i) A state shall impose each condition of eligibility required by the Social Security Act; and

(ii) A state may:

(A) Provide more limited public assistance coverage than that provided by the Act *only where the*

[3]In Illinois, related foster family homes are "approved" while non-related foster homes are "licensed." Both licensed and approved homes must meet the same standards.

Social Security Act or its legislative history authorizes more limited coverage: . . .

(iii) There must be clarity as to what groups are included in the plan, and which are within, and which are outside, the scope of Federal financial participation.

(iv) Eligibility conditions must be applied on a consistent and equitable basis throughout the state. . .

(vii) Methods of determining eligibility must be consistent with the objective of assisting all eligible persons to qualify.

(emphasis added) [Text: S -5].

The underlined section is another statement of this Court's holding in *Burns v. Alcala, supra.* Unless the Defendants can show where the plain words or legislative history of the Social Security Act specifically authorizes the denial of AFDC-FC payments to the children in the Plaintiff class, all of whom are otherwise eligible, the scheme must fail.

There is no doubt that

[s]tates have considerable latitude in allocating their AFDC resources, since each state is free to set its own standard of need and to determine the *level* of benefits by the amount of funds it devotes to the program.

Dandridge v. Williams 397 U.S. 471 at 478 (1970) quoting *King v. Smith, supra.* (emphasis added).

But a state's discretion is limited to setting the *level* of benefits and the standard of need. Federal law defines *eligibility*. The state cannot deny assistance to persons, like Plaintiffs, whom the federal law defines as eligible to receive it. 42 U.S.C. § 608. *King v. Smith, Townsend*

v. Swank, Carleson v. Remillard, Burns v. Alcala, Van Lare v. Hurley, supra. In the absence of persuasive reasons to the contrary, the plain meaning of the statute must be followed. *Banks v. Chicago Grain Trimmers,* 390 U.S. 459 at 465, 88 S. Ct. 1140 (1968).

The plain meaning of the Social Security Act is that the state must make full AFDC-FC payments to children placed in approved foster homes maintained by their relatives. Unless following the ordinary meaning of the term "any individual" would manifestly defeat the object of the law, it must be presumed that Congress intended just what it said. See *Minor v. Mechanics Bank,* 26 U.S. 46, 64 (1828). Here, the ordinary meaning of the term manifestly *advances* the object of the law: it enables the state to secure high quality foster care and preserve and strengthen the family associations of the foster children.

B. The established position of H.E.W. is that the Social Security Act and Regulations require that children placed in approved foster homes maintained by their relatives are eligible for full AFDC-FC payments; denial of the payments violates the Act.

This Court has traditionally considered that the

rulings, interpretations and opinions of the agency responsible for the administration of the Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.

Skidmore v. Swift & Co., 323 U.S. 134, 140 65 S. Ct. 161 (1944). *U.S. v. Pennsylvania Chemical Co.* 411 U.S. 655, 674, 93 S. Ct. 1804 (1973)

In questions of the interpretation of the Social Security Act, the Court gives certain deference to the position of the administrators in the Department of Health, Education and Welfare. *Lewis v. Martin*, 397 U.S. 552, 559, 90 S. Ct. 1282, (1970). The position of the Department of H.E.W. represents a national perspective and a continuing effort to secure uniformity and consistency in the administration of the Act.

H.E.W. has repeatedly urged the same position advanced by Plaintiffs-Appellants.

Most recently and most graphically, in an *amicus* memorandum filed in this case on February 19, 1975, the Solicitor General argued on behalf of H.E.W.:

> We submit that the Illinois policy of denying foster care AFDC benefits for children living with relatives is invalid because it conflicts with specific criteria for eligibility set forth in the Social Security Act; . . .
>
> *Amicus Memorandum* 2

and

> [T]he only qualification for foster-care benefits is that the child be "dependent" and that it be living in a foster home or a child-care institution as the result of a judicial determination that its own home is unsuitable. Those conditions were satisfied here, and the child is therefore entitled to foster-care benefits.
>
> *Id.* at 5

The argument by the Solicitor is a restatement of the H.E.W.'s position that the Act requires payment of full AFDC-FC funds to foster children placed in the homes of their relatives. In fact the Department recently issued a direct instruction to all the state welfare agencies,

including the Defendant-Appellee DCFS, that full AFDC-FC funds must be paid to children in approved foster homes maintained by relatives.

Because it is unequivocal, and may resolve this controversy, the Program Instruction is here set out in its entirety.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

PROGRAM INSTRUCTION
APA-PI-75-9
October 25, 1974

TO: STATE AGENCIES ADMINISTERING APPROVED PUBLIC ASSISTANCE PLANS

SUBJECT: AFDC Foster Care

COMMENT: This program instruction is issued to resolve the problem of some States not licensing or approving the homes of non-legally liable relatives as foster care homes even though suitable foster care could be provided in the homes and payments made at the foster care rate when children are placed with relatives who meet all conditions of eligibility for AFDC-FC.

There have been several U.S. District Court decisions which have held that States may not refuse to provide the foster care rate to a foster home because it is operated by relatives who have no

legal responsibility for support and care of the child.

In addition, the U.S. Supreme Court in the case of *Ramos v. Montgomery*, January 18, 1971, upheld making a higher payment for foster care than was provided under a state's standard for AFDC payments.

Under 45 CFR 233.110(a)(1), states must provide for aid in the form of foster care for each otherwise eligible child as specified in the Act and in 233.110(b). Federal financial participation is available for children who are placed in a foster home or nonprofit private child-care institutions licensed or approved by the agency which is responsible for licensing or approval of such facilities in the State. These provisions apply regardless of whether the licensed or approved foster family home in which a child is placed is operated by a relative (with no legal responsibility to support the child).

When a child has been removed from his home by judicial determination and is placed in foster care under the various conditions specified in Section 408 of the Social Security Act and 45 CFR 233.110, the foster care rate of payment prevails regardless of whether or not the foster home is operated by a relative. A non-legally liable relative has no financial responsibility towards the child placed with him and the income and resources of such a relative are not factors in determining entitlement to a foster care payment. It must be noted, too, that the

1967 amendments to the Social Security Act liberalized Federal financial participation in the cost of foster care, recognizing foster family care is more costly than care in the child's own home.

INQUIRIES TO:
SRS Regional Commissioners

/s/John A. Svahn
JOHN A. SVAHN
Commissioner
Assistance Payments Administration

Plaintiffs-Appellants respectfully urge that the position taken by H.E.W. is correct and consistent with the plain meaning and history of the Social Security Act. H.E.W. issued its Program Instruction to solve the problem the Court now faces.[4] A reversal by this Court should secure much greater consistency among the states in their administration of their AFDC-FC programs.

The state then claims that the statutes challenged by Plaintiffs which engraft the term "unrelated" into the definition of foster family home (Ch. 23 §§2212.05,

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[4] Illinois is one of the states where instruction from H.E.W. is most needed. In their Motion to Dismiss or Affirm filed in September 1974, Defendants-Appellees took the position that under its present laws, Illinois could, if it wished, make AFDC-FC payments in the full amount of $105.00 to children placed in approved foster homes maintained by their relatives. Ill. Rev. Stats., Ch. 23 §4-1.2 [Text: S 1-12]. This would make the DCFS Regulation [App. 36] which says that there is no statutory authority to make foster care payments to relatives a plain untruth.

2212.17 [App. 21]), and the section of the Child Care Act which allows payment only to *licensed* child care facilities (Ch. 23, § 5005 [App. 24, 27], are naught but licensing provisions and have nothing to do with payment for foster care.

In their affidavit of January 8, 1974 in Support of Motion for Summary Judgment, which was in part stricken by the District Court, one of the Defendants' lawyers stated:

> The Department's general policy of not paying relatives is not based on the Child Care Act of 1969 which established licensing criteria, but on the administrative interpretation of the Department and the United States Department of Health, Education and Welfare that Federal financial participation would not be available under Section 408 (42 USCA § 608 1972) of the Social Security Act to children living with relatives as defined by Section 406(a) of the Social Security Act (42 USCA § 606(a) 1972).
>
> [App. 42]

And Defendants made this same assertion in their Motion to Dismiss or Affirm, at 6.

If the Illinois *statutes* are not the basis for denying Plaintiffs' eligibility (contrary to the District Court's finding, 374 F. Supp. at 1205) then perhaps it is only the state's regulations which are in issue. If the sole basis for the state's denial of payment was its understanding that H.E.W. would deny federal financial participation if the payments were made, then Illinois' policy is based on an error. After the October 25, 1974 Program Instruction, *supra*, no one could misunderstand H.E.W.'s position. To the degree Illinois' scheme was

based on the administrative interpretation of H.E.W., it is now baseless.

C. The legislative history and overall purpose of the Social Security Act make Plaintiffs eligible for full AFDC-FC payments; denial of the payments violates the Act.

The entire history and present administration of Title IV of the Social Security Act, including the more recent federal foster care program, must be considered in light of the overall purpose for which all federal funds under Title IV are appropriated.

The present purpose is declared in Section 401:

> For the purpose of encouraging the *care of dependent children in their own homes or in the homes of relatives* by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to *needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life* and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, . . .
>
> 42 U.S.C. § 601 [App. 28] (emphasis added)[5]

The original Aid to Dependent Children program was established by Congress in 1935 to provide assistance to

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[5] For further discussion of the overall purpose of the Social Security Act in relation to the foster care program, see the attached Memorandum of Decision of Chief Judge Fred J. Nichol in *Clampett v. Madigan*, supra, the South Dakota version of the *Youakim* case [Text: S-8 ff, at S-12].

needy children who were living with their parents or certain designated relatives, and who were deprived of parental support for one of three narrowly defined reasons: the death, continued absence from the home, or physical or mental incapacity of a parent. Section 406(a) 42 U.S.C. § 606(a). [Text: S-3].

The policy that requires support of children in the homes of their relatives when they cannot live with their parents, and the purpose to help maintain and strengthen family life and associations was established from the beginning.[6]

The same concern for the sanctity and importance of preserving family ties permeates the history of the Act. Thus in 1961 when Congress recognized the need for a new, separate program to assist a fourth category of children – foster children – the Senate Committee cautioned:

> The foster care provisions in your committee's bill have been designed, insofar as possible, to safeguard the rights of the child and his parents or relatives. No one takes lightly the severance even for a brief period, of the ties between a child and parent, or somebody closely related to him.
>
> Sen. Rep. No. 165, 87th Cong., 1st Sess. 1961 U.S. Cong. & Adm. News V.2.1722.

The policy that children who cannot live with their parents should live with relatives whenever possible and that the Act must be administered to maintain and strengthen family ties is the underlying theme of the entire program of aid to dependent children.[7]

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[6] See Sen. Rep. No. 628, 74th Cong. 16, 17 and 34-36 (1935).

[7] 42 U.S.C. § § 601, 602(d)(13)(14), 606(d), 625.

In 1956 the policy mandate to place children who could not live with their parents in the homes of their relatives was codified in Section 401. 42 U.S.C. § 601. August 1, 1956 C. 836, Title III, § 312(a), 70 Stat. 848.

In 1962 Congress again declared its concern for the maintenance of family life and the importance of family ties when it changed the beneficiaries of the program from "needy children" to "needy families with children." ADC became AFDC. 42 U.S.C. § § 601, 602(a) ff. July 25, 1962, Pub. L. No. 87-543, Title I, § 104(a)(4), 76 Stat. 185.

The overall purpose of the Social Security Act is to strengthen family life and associations and to provide for care of children by their parents, or if that is not possible, then by their relatives. All state programs which participate in federal funds under Title IV must conform to this purpose.

When it enacted § 408, 42 U.S.C. § 608[7A] in 1961 the Congress clearly created a new category of recipients of a specialized type of assistance. The new foster care program (ADC-FC, later AFDC-FC)

> would allow the states the option of bringing needy dependent children under the federally aided program *where a court of competent jurisdiction finds that the children are not receiving proper care and protection in their own homes* and gives the responsibility to the state agency to place them in foster family homes.
>
> Sen. Rep. No. 165, 87th Cong. 1st Sess., 1961 U.S. Cong. & Adm. News V. 2. (1717). (emphasis added)

[7A] 42 U.S.C. § 608. May 8, 1961, Pub. L. No. 87-31 § 2 75 Stat. 76.

The Committee noted that state foster care programs varied widely and that

> [t]he lack of financial resources for such care has hindered the development of *the most suitable care* for children who have to be cared for outside their own home.
>
> *Id.* at 1721 (emphasis added)

The definition of "foster family home" [Part I-A *supra*] and the provision to allow payment for foster care in the home of "any individual" were set out in Section 408 as it was originally drawn in 1961. When the Senate Committee recognized the need to develop "the most suitable care for children who have to be cared for outside their own homes," they meant to include, and even favor, foster care in the homes of relatives. This conclusion follows in light of:

--the long-standing and overall policy of preference for care in homes of relatives and the importance attached to maintaining family associations, and

--congress' use of the unrestrictive term "any individual" in Section 408.

Proposed in 1962, but not enacted until 1968 was the current definition of child welfare services, which include:

> otherwise protecting and promoting the welfare of children, including the strengthening of their own homes where possible or, where needed, the provision of adequate care of children away from their home in foster family homes or day care or other child care facilities.[8]

[8] 42 U.S.C. § 625 added January 2, 1968 C. 531. Title IV, § 425, Pub. L. No. 90-248, Title II § 240(c) 81 Stat. 914 [App. 28].

Sen. Rep. No. 1589, 87th Cong. 2nd Sess. 1962 U.S. Cong. & Adm. News V.1.1959.

The language is consistent with the plain meaning of the statute and the interpretation of Title IV urged by H.E.W. and the Plaintiffs-Appellants. There is nothing in the legislative history of the 1962 amendments which would authorize the state to limit eligibility as defined in Section 408 of the Act.[9]

The strongest support for the interpretation urged by Plaintiffs and H.E.W. appears in the legislative history of the 1968 amendments. The Committee recognized that there simply was not enough money for the development of quality foster care programs in the states and that the lack of federal revenue sharing would make local courts reluctant to place a child in foster care which was entirely locally funded. Sen. Rep. No. 744, 90th Cong. 1st Sess. 1967 U.S. Code & Adm. News. V. 2.3001-3002. The thrust of the 1968 amendments relating to the AFDC-FC program was to make the program less restrictive and more remunerative. Congress offered the states the incentive of increased federal revenues in order to encourage development of more, and better, foster care programs operated more efficiently and with greater uniformity.

Finally, and most importantly, the Committee specifically acknowledged what the states had long since learned: foster care is more expensive than other forms of AFDC care.[10]

[9] 42 U.S.C. § § 601, 602, ff. Amended January 2, 1968, Pub. L. 90-248. Title II. § 201 ff., 81 Stat. 877 ff.

[10] Cf. *Ramos v. Montgomery* 313 F. Supp. 1179 (S.D. Cal. 1970), aff'd 400 U.S. 1003, 91 S. Ct. 572 (1971).

Under the committee bill, *Federal funds will be available on a more liberal basis than for the basic program out of a recognition that foster family care is more costly than care in the child's home.* Effective July 1, 1969 state plans would have to provide for foster care under these terms. Federal sharing will be possible in payments up to $100 a month (on an average basis) for children in foster care. The committee believes that these liberalizations will be of material assistance to States and localities *and will facilitate plans being developed for children based on the need of the child rather than the fiscal condition of the local government.*

Id. at 3001, 3002. (emphasis added)

The reasons for the committee's comments are obvious. Relatives, who have no legal duty to support their kin, and who would not undertake to subsidize the state's obligation, refused or were unable to provide the expensive foster care at the regular, lower, AFDC rate. Congress recognized this, and advised the states that children in approved foster homes maintained by their relatives were, like all other foster children, expensive to care for, and eligible for the full AFDC-FC payments.

The Act's history and purpose are to maintain and strengthen family ties. There is paramount legislative interest in obtaining the best possible environment for the child, whose needs are superior to any state financial interest.[11] The plain words of § 408 provide for full foster care payments to children in the home of "any individual." Plaintiffs-Appellants maintain only one conclusion is possible. The Illinois foster care

[11]This Court expressed a similar view in *King v. Smith* 392 U.S. 309 at 325, 88 S. Ct. 2128 (1970).

payment scheme violates the Social Security Act and Regulations and the Supremacy Clause. By the clear words of the statute Plaintiffs are eligible for full foster care payments. The program administrators at H.E.W. interpret the Social Security Act according to its plain meaning. They have instructed all the states to apply the law as it is written and to pay full AFDC-FC payments to foster children placed in the approved home of any individual, including a relative of the foster child.

Nothing in the legislative history authorizes the states to limit eligibility. An examination of the development of the law and of the committee arguments indicates the opposite congressional intent.

Illinois' attempt to engraft an additional eligibility condition onto a clear federal definition must fail. Its policy violates the plain meaning and overall purpose of the Social Security Act. Families are separated, not strengthened. The scheme imposes an economic burden on relatives who might otherwise be willing to provide foster care. In clear violation of the numerous pronouncements by this Court, the Illinois scheme assumes income and contributions will be forthcoming from persons who have no legal duty to contribute. Two of the three federal district courts that considered the question here presented found the state schemes violated the Social Security Act and the Supremacy Clause. The Northern Illinois District Court erred. Its decision must be reversed. The Illinois laws and regulations must be revised to conform to the federal law.

II.

THE ILLINOIS FOSTER PAYMENT SCHEME CREATES TWO CLASSES OF PERSONS FOR FOSTER CARE BENEFITS: FOSTER CHILDREN LIVING WITH FOSTER PARENTS WHO ARE STRANGERS AND FOSTER CHILDREN LIVING WITH FOSTER PARENTS WHO ARE RELATED TO THEM. FULL FOSTER CARE PAYMENTS ARE MADE TO THE FORMER CLASS AND NONE ARE MADE TO THE LATTER. THIS CLASSIFICATION VIOLATES THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, AND SPECIFICALLY THE EQUAL PROTECTION CLAUSE.

Introduction

The Fourteenth Amendment holds that no state may deny its citizens equal protection of the laws. The Illinois foster care payment scheme violates equal protection because it results in invidious discrimination against a sub-group of the state's foster children.

Full foster care payments are made to all Illinois foster children except those who are in the best placement: approved foster homes maintained by their relatives. These latter children receive no AFDC-FC payments. They are cut off for the sole reason the placement is deemed best: because of the family ties between the child and his foster parent.

The discrimination persists even though:

-- no foster parents–related or unrelated–have any legal duty to support their foster children. Ill. Rev. Stats. Ch. 23, § 2-11(1971) [Supp. S-1].

-- the state has the identical duty to support each of its wards and cannot look to anyone, including non-legally responsible relatives, to subsidize its obligation; and

-- the children incur the same expenses whether their foster home is maintained by strangers or relatives.

The Court should analyze the equal protection claim of Plaintiffs-Appellants by applying either of two tests: A. As it has done in several recent cases which considered challenges to violations of important personal rights, the Court should closely examine and balance: 1) the character of the classification; 2) the nature of the personal interest infringed, and 3) the nature of government interest advanced.[12] B. Alternatively, the Court should apply its minimum scrutiny-mere rationality test, the second level of the traditional two-tier approach to equal protection.

Application of either test will result in a finding that the Illinois foster care scheme invidiously discriminates against Plaintiffs-Appellants, that the discrimination bears no rational relationship to any legitimate state interest, and that the scheme violates Plaintiffs' right to equal protection of law. Neither the possibility of smaller payments under the regular AFDC program, nor the slight possibility of larger payments under an arbitrary setup of "exceptions to policy" payments can save the unconstitutional Illinois scheme.

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[12]For a recent description of this approach see:

Gunther, Foreword: In Search of an Evolving Doctrine on A Changing Court: A Model for A Newer Equal Protection, 86 Harv. L. Rev. 1 (1972).

A. This Court should follow its recent jurisprudence and give close scrutiny to: 1) the character of the classification; 2) the nature of the personal interest infringed, and 3) the nature of the state interest advanced by Illinois' discriminatory foster care payment scheme. On balance, it is unconstitutional.

1. Illinois' denial of AFDC-FC payments to children who are placed in approved foster homes maintained by their relatives results in invidious discrimination against a class of children.

The sub-class of foster children represented by Plaintiffs has the characteristics of a suspect class. The discrimination results from the following facts: First, for whatever tragic reasons the parents of these children rejected, neglected or failed them. Second, the juvenile court adjudicated them, labeled them, and made the state their parent. A certain opprobrium inevitably attaches to the children as a result of this process. Third, the state picked a state-approved foster home for them. The children had no choice about any of this.

The law mandates that the children be placed in foster homes maintained by their relatives if possible. They have no choice about that either. But most children prefer and need a strong family relationship and identity. The children, parentless, believe themselves fortunate that they might move in with other relatives with whom they have immutable lifelong relationships.

Then the state tells the children and the potential foster parents about the price they must pay for their status as relatives. Illinois pays a premium to keep

children with strangers. And they have no choice about that either.

These children warrant the Court's close attention and considerable protection. The politically powerless sub-class of children represented by the Plaintiffs is much like the class of illegitimate children. The discrimination against them is equally illogical, unjust and invidious. *Weber, supra,* at 175. The Court should give close scrutiny to their claim.

The Court has given close scrutiny to statutes which discriminate against illegitimate children. These children have not been declared to be members of a suspect class, but the Court nonetheless affords them close attention and considerable protection. See *Levy v. Louisiana,* 391 U.S. 68, 88 S. Ct. 1509 (1968); *Weber v. Aetna Casualty and Surety Co.,* 406 U.S. 164, 92 S. Ct. 1400 (1972); *Griffin v. Richardson,* 346 F. Supp. 1226 (D. Md. 1962), aff'd 409 U.S. 1069, 93 S. Ct. 689, (1972); *Davis v. Richardson,* 342 F. Supp. 588 (D. Conn. 1972), aff'd 409 U.S. 1069, 93 S. Ct. 678 (1972); *Gomez v. Perez,* 409 U.S. 535, 94 S. Ct. 872 (1973); *New Jersey Welfare Rights Organization v. Cahill,* 411 U.S. 619, 93 S. Ct. 1700 (1973); *Jiminez v. Weinberger,* 417 U.S. 628, 94 S. Ct. 2496 (1974).

2. Illinois' denial of AFDC-FC payments to children who are placed in approved foster homes maintained by their relatives infringes an interest and violates a right that is basically and fundamentally important: the right to preserve and strengthen family associations.

The interest of the Plaintiff children that the discriminatory Illinois foster care payment scheme

violates is one of basic and fundamental importance. While this Court has not declared it to be a traditional "fundamental interest" it has recognized its importance and given close scrutiny to statutes which would infringe upon it. *Levy v. Louisiana, supra.*

In *Stanley v. Illinois,* 405 U.S. 645, 92 S. Ct. 1208 (1972) the Court catalogued the cases upholding the right of family association—a right so basic that the state's contrary fiscal and administrative interests must fall before it:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights," *May v. Anderson,* 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska, supra,* at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma, supra,* at 541, and the Ninth Amendment, *Griswold v. Connecticut,* 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).
>
> *Stanley* at 651.

In *Levy* and *Stanley* the Court recognized and deferred to the warm, deep and enduring relationship between parent and child. In *Youakim* the relationship

between brother and sister is similarly warm, deep and enduring, particularly because the parents are tragically absent. This Court should give close scrutiny to state statutes whose rhetoric encourages the relationship, but whose economics destroy it.

3. On balance with the character of the discrimination and the importance of the personal rights infringed, any state interest purportedly served by Illinois' denial of foster care payments is not sufficient to justify the scheme.

Traditionally, in cases where there has been no suspect class or fundamental interest in play, the Court has examined the state's interest by application of the lenient "mere rationality—minimum scrutiny" test of *Morey v. Doud,* 354 U.S. 457, 77 S. Ct. 1344 (1953):

> When a classification in a law such as this is called into question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

But in recent years, particularly in cases concerning important personal rights, the Court has given much closer scrutiny to the state interest purportedly advanced. The Court now requires more than the first speculated, then presumed, idea that the state legislature must have had some good in mind when it enacted the discriminatory statute. *Weinberger v. Weisenfeld,* ____ U.S. ____, 95 S. Ct. 1225 at 1233 and note 16 (1975). It now may require that the interest advanced by the classification be articulated and factually based, *Kahn v. Shevin* 416 U.S. 351, 94

S. Ct. 1734 (1974), and in fact bear a fair and substantial relationship to an overall and a legitimate state purpose. *Weber v. Aetna Life and Casualty Co.* 406 U.S. 164, 92 S. Ct. 1400 (1972); *Jiminez v. Weinberger, supra.*

Any state interest which does not meet the above criteria must be of such little weight that when balanced with the fundamentally important personal rights infringed the state interest must fail, and the Court must find the law to be unconstitutional.

The District Court mentioned three state interests which might be advanced by the denial of AFDC-FC payments. One is the

> "motivation to provide as many foster homes as possible be restricting the distribution of available funds only to persons who would otherwise have had no particular reason or incentive for becoming foster parents rather than allocating the funds to *all persons* who become foster parents and thereby reducing the amount received by each . . .
>
> 374 F. Supp. at 1208 [App. 56]. (emphasis added)

The Court conceded that this interest might have the effect of keeping families separate, but that nonetheless the overall purpose of the protection and care of children generally would be served. 374 F. Supp. at 1209 note 6. [App. 59].

A state interest was thus articulated and noted by the District Court. But the interest was speculative. The lower court erred in its failure to require a factual basis and it erred in its application of the mere rationality test. The District Court misconstrued the overall legitimate state interest supposedly advanced.

In the same footnote the District Court inferred that the state's interest in strengthening the family unit is of lesser importance than the care of children generally. This is a gross misinterpretation of the overall *state* purpose. The state welfare statutes involved in this case, all of which must conform to the federal law and its overall purpose, consistently mandate that strengthening the family unit is the central and overall purpose of the state's welfare system.[13]

The state interest purportedly advanced by the discrimination against Plaintiffs are not sufficiently legitimate to justify it. The statutes that dictate the cutoff of AFDC-FC payments and the purpose they allegedly serve do not bear a fair and substantial relationship to, nor do they significantly advance, the overriding state purpose of strengthening and rendering service to *families.*

The government interests proposed in *Youakim* are no more weighty than those found insufficient in *Reed v. Reed,* 404 U.S. 71, 92 S. Ct. 251 (1971); *Jiminez v. Weinberger, supra; Weinberger v. Weisenfeld, supra;*

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[13]Cf. Ill. Rev. Stats., Ch. 23 § 5005 ¶¶3, 6 (1971) [App. 23, 25] Ill. Rev. Stats., Ch. 37 § 701-2(1) (1971) [App. 30]. DCFS Regulation [App. 34].

The Court's observation that the change Plaintiffs seek would interfere with the state's adoption system is likewise speculative and not supported by the record. 374 F. Supp. at 1209 note 5. Another state interest was suggested by the state's lawyers: if the Defendants did not cut off the payments, Illinois would lose its participation in the federal funding. Thus the policy was dictated by H.E.W.'s administrative interpretations of the Social Security Act. This reason has simply disappeared. Cf. discussion in Part I-B and note 4, *supra.*

Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029 (1972); *Frontiero v. Richardson*, 411 U.S. 677, 93 S. Ct. 1764 (1973); *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 93 S. Ct. 2821 (1973); and other illegitimacy cases set out in Part II-A-1 supra.

Should this Court balance the interests and give close scrutiny to the invidious classification, it must then conclude that the Illinois scheme violates equal protection of law.

B. The Illinois foster care payment scheme which denies AFDC-FC payments to children who are in the best placement, in approved foster homes maintained by their relatives, is not rationally related to any legitimate state interest.

For the reasons set forth in Part II-A-3, *supra*, Plaintiffs-Appellants suggest that no legitimate state interest was ever articulated by the District Court, and that the state statutes before the court indicate that strengthening and rendering services to *families* is the only and overriding legitimate state interest in play.

The present Illinois foster care scheme may, as the District Court recognized, keep some children from living with their relatives. 374 F. Supp. at 1208 [App. 56]. And there was no satisfactory response to the Plaintiffs' assertion that the state had breached its duty to treat all its wards equally.

> Plaintiffs argue that, by providing for state aid only to foster parents who are unrelated to the child and denying it to others, the state has breached its duty to provide equally for all

> dependent children and has in fact contributed to the breakup of family homes. They assert that since related foster parents have the same need for state subsidies to provide adequately for their foster children as do unrelated foster parents, there is no basis for the distinction. Although this statement of the state's duty may indeed be correct, plaintiffs have failed to recognize both the purpose for which the payments are made and the test [i.e., of *Morey v. Doud* and *Lindsley v. National Carbonic Gas Co., supra.*] to be employed in examining the classification of the statute.
>
> at 1208 [App. 55-56].

As it misconstrued the overall purpose of the Illinois welfare and family services laws, the District Court could not correctly apply the minimum scrutiny test. Its decision should be reversed.

This Court's recent decision in *Williams v. Wohlgemuth*, 366 F. Supp. 541 (W.D. Pa. 1973), aff'd 416 U.S. 901, 94 S. Ct. 1604 (1974), may dispose of the equal protection claim in *Youakim*. The minor plaintiffs in that case challenged a Pennsylvania welfare regulation which cut off general assistance grants to children who were living with unrelated substitute parents on the grounds that the regulation violated equal protection.

The cutoff was automatic: the sole basis was the child's status as a nonrelative to the substitute parent. As the general assistance payments were not federally subsidized, there was no question of interpretation of the Social Security Act and the three judge court was able to reach the constitutional question at the outset.

The *Williams* case is, in effect, the mirror image of the *Youakim* case absent the supremacy claim. In

Williams the children were dropped from general assistance for the sole reason that they were not related to the substitute parents with whom they had lived for several years and with whom they had a *de facto* family relationship. In *Youakim* the children were cut off from AFDC-FC for the sole reason that they were related to their foster parents—the very reason they were placed with them. As in *Youakim*, there was in the *Williams* case theoretically another assistance program through which the plaintiff children could have received aid. But as in *Youakim*, the mechanics of securing it were difficult, burdensome and risky.

In his majority opinion, Judge Knox applied the traditional equal protection test, and held that the classification was irrational, invidious, and in violation of equal protection. 366 F. Supp. at 546. The District Court found that the state interest purportedly advanced by the regulation, i.e., uniformity and administrative convenience in caring for all orphans through the Child Welfare Agency, was in no way rationally related to the overall state legislative purposes of providing assistance to needy persons. This Court affirmed without opinion. 416 U.S. 901, 94 S. Ct. 1604 (1974).

Similarly in *Youakim* this Court should find that the speculative interest allegedly advanced, the development of more foster homes, is in no way rationally related to the overall state legislative purposes of providing family and social welfare services, and strengthening the family ties of the state's wards.

Illinois' denial of AFDC-FC payments to its wards who are placed in the best possible placement, an approved foster home maintained by relatives of the

ward, cannot stand up under any test of equal protection. This Court should declare the scheme unconstitutional.

CONCLUSION

For the foregoing reasons Plaintiffs-Appellants respectfully ask that the District Court's summary judgment for Defendants be reversed with directions to enter summary judgment for Plaintiffs, or in the alternative, to set the matter for trial.

Respectfully submitted,

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SUPPLEMENT

ILLINOIS REVISED STATUTES

Chapter 23

Charities and Public Welfare

§ 2–11. "Legally Responsible Relative"

"Legally Responsible Relative": the spouse of an applicant or recipient; the parent or parents of a child who is under age 21.

The support obligation of other persons defined as "legally responsible relatives" in this Section prior to the effective date of the Amendatory Act of 1967 and the Amendatory Act of 1969 for aid extended to their dependents prior to such effective date, shall remain unimpaired.

Amended by P.A. 76–1765, § 1, eff. Oct. 6, 1969.

§ 4–1.2 Living Arrangements—Parents—Relatives—Foster Care

The child or children must (1) be living with his or their father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt, or other relative approved by the Illinois Department, in a place of residence maintained by one or more of such relatives as his or their own home, or (2) have been (a) removed from the home of the parents or other relatives by judicial order under the "Juvenile Court Act", approved August 5, 1965, as amended,[1] (b) placed under the guardianship of a county superintendent of public aid or the principal administrative officer in the Division of Child Welfare of the Department of Children and Family Services, and (c) under such guardianship, or other guardianship authorized prior to the effective date of this 1969 Amendatory Act, placed in a foster family home or child care institution licensed pursuant to the "Child Care Act", approved July 10, 1957, as amended,[2] or approved by that Department as meeting standards established for licensing under that Act. A child so placed in foster care who was not receiving aid under this Article in or for the month in which the court proceedings leading to that placement were initiated may qualify only if he lived in the home of his parents or other relatives at the time the proceedings were initiated, or within 6 months prior to the month of initiation, and would have received aid in and for that month if applicaton had been made therefor.

The conditions of qualification herein specified shall not prejudice aid granted under this Code for foster care prior to the effective date of this 1969 Amendatory Act.

Amended by P.A. 76–1199, § 1, eff. Sept. 4, 1969.

[1] Chapter 37, § 701—1 et seq.
[2] Chapter 23, § 2301 et seq., repealed.

UNITED STATES CODE

Title 42

The Public Health and Welfare

§ 602. State plans for aid and services to needy families with children; contents; approval by Secretary

(a) A State plan for aid and services to needy families with children must . . .

(20) effective July 1, 1969, provide for aid to families with dependent children in the form of foster care in accordance with section 608 of this title; . . .

§ 603. Payment to States; computation of amounts; Federal share of assistance payments; social and supportive services; appropriation; family planning services and supplies; reduction of amounts

(a) From the sums appropriated therefor, the Secretary of the Treasury shall (subject to section 1320b of this title) pay to each State which has an approved plan for aid and services to needy families with children, for each quarter, beginning with the quarter commencing October 1, 1958—

(1) in the case of any State other than Puerto Rico, the Virgin Islands, and Guam, an amount equal to the sum of the following proportions of the total amounts expended during such quarter as aid to families with dependent children under the State plan (including expenditures for premiums under part B of subchapter XVIII of this chapter for individuals who are recipients of money payments under such plan and other insurance premiums for medical or any other type of remedial care or the cost thereof)— . . .

(B) the Federal percentage of the amount by which such expenditures exceed the maximum which may be counted under clause (A), not counting so much of any expenditure with respect to any month as exceeds (i) the product of $32

multiplied by the total number of recipients of aid to families with dependent children (other than such aid in the form of foster care) for such month, plus (ii) the product of $100 multiplied by the total number of recipients of aid to families with dependent children in the form of foster care for such month;

§ 606. Definitions

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

§ 606. Definitions [Continued]

(b) The term "aid to families with dependent children" means money payments with respect to, or (if provided in or after the third month before the month in which the recipient makes application for aid) medical care in behalf of or any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care recognized under State law to meet the needs of the relative with whom any dependent child is living (and the spouse of such relative if living with him and if such relative is the child's parent and the child is a dependent child by reason of the physical or mental incapacity of a parent or is a dependent child under section 607 of this title), and (2) payments with respect to any dependent child (including payments to meet the needs of the relative, and the relative's spouse, with whom such child is living, and the needs of any other individual living in the same home if such needs are taken into account in making the determination under section 602(a)(7) of this title) which do not meet the preceding requirements of this subsection, but which would meet such require-

ments except that such payments are made to another individual who (as determined in accordance with standards prescribed by the Secretary) is interested in or concerned with the welfare of such child or relative, or are made on behalf of such child or relative directly to a person furnishing food, living accommodations, or other goods, services, or items to or for such child, relative, or other individual, but only with respect to a State whose State plan approved under section 602 of this title includes provision for—

(A) determination by the State agency that the relative of the child with respect to whom such payments are made has such inability to manage funds that making payments to him would be contrary to the welfare of the child and, therefore, it is necessary to provide such aid with respect to such child and relative through payments described in this clause (2);

(B) undertaking and continuing special efforts to develop greater ability on the part of the relative to manage funds in such manner as to protect the welfare of the family;

(C) periodic review by such State agency of the determination under clause (A) to ascertain whether conditions justifying such determination still exist, with provision for termination of such payments if they do not and for seeking judicial appointment of a guardian or other legal representative, as described in section 1311 of this title, if and when it appears that the need for such payments is continuing, or is likely to continue, beyond a period specified by the Secretary;

(D) aid in the form of foster home care in behalf of children described in section 608(a) of this title; and

(E) opportunity for a fair hearing before the State agency on the determination referred to in clause (A) for any individual with respect to whom it is made;

(c) The term "relative with whom any dependent child is living" means the individual who is one of the relatives specified in subsection (a) of this section and with whom such child is living (within the meaning of such subsection) in a place of residence maintained by such individual (himself or together with any one or more of the other relatives so specified) as his (or their) own home.

(d) The term "family services" means services to a family or any member thereof for the purpose of preserving, rehabilitating, reuniting, or strengthening the family, and such other services as will assist members of a family to attain or retain capability for the maximum self-support and personal independence.

CODE OF FEDERAL REGULATIONS

Title 45—Public Welfare

Chapter II—Social and Rehabilitation Service (Assistance)

PART 233—COVERAGE AND CONDITIONS OF ELIGIBILITY IN FINANCIAL ASSISTANCE PROGRAMS

Sec.

233.10 General provisions regarding coverage and eligibility.
233.11 Special provisions applicable to the work incentive program; State plan requirements.
233.20 Need and amount of assistance.
233.30 Age.
233.40 Residence.
233.50 Citizenship and alienage.
233.60 Institutional status.
233.70 Blindness.
233.80 Disability.
233.90 Factors specific to AFDC.
233.100 Dependent children of unemployed fathers.
233.110 AFDC foster care.
233.120 Emergency assistance to needy families with children.
233.140 Expiration of community work and training program.
233.145 Expiration of medical assistance programs under titles I, IV-A, X, XIV and XVI of the Social Security Act.

AUTHORITY: The provisions of this Part 233 issued under sec. 1102, 49 Stat. 647; 42 U.S.C. 1302, unless otherwise noted.

§ 233.10 General provisions regarding coverage and eligibility.

(a) *State plan requirements.* A State plan under title I, IV-A, X, XIV, or XVI, of the Social Security Act must:

(1) Specify the groups of individuals, based on reasonable classifications, that will be included in the program, and all the conditions of eligibility that must be met by the individuals in the groups. The groups selected for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act. Under this requirement:

(i) A State shall impose each condition of eligibility required by the Social Security Act; and

(ii) A State may:

(A) Provide more limited public assistance coverage than that provided by the Act only where the Social Security Act or its legislative history authorizes more limited coverage;

(B) Impose conditions upon applicants for and recipients of public assistance which, if not satisfied, result in the denial or termination of public assistance, if such conditions assist the State in the efficient administration of its public assistance programs, or further an independent State welfare policy, and are not inconsistent with the provisions and purposes of the Social Security Act.

(iii) There must be clarity as to what groups are included in the plan, and which are within, and which are outside, the scope of Federal financial participation.

(iv) Eligibility conditions must be applied on a consistent and equitable basis throughout the State.

(v) A plan under title XVI must have the same eligibility conditions and other requirements for the aged, blind, and disabled, except as otherwise specifically required or permitted by the Act.

(vi) Eligibility conditions or agency procedures or methods must not preclude the opportunity for an individual to apply and obtain a determination of eligibility or ineligibility.

(vii) Methods of determining eligibility must be consistent with the objective of assisting all eligible persons to qualify.

(2) Provide that the State agency will establish methods for identifying the expenditures for assistance for any groups included in the plan for whom Federal financial participation in assistance may not be claimed.

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(3) In addition, a State plan under title IV-A, X, XIV, or XVI of the Act, must: Provided that no aid or assistance will be provided under the plan to an individual with respect to a period for which he is receiving aid or assistance under a State plan approved under any other of such titles or under title I of the Act.

(b) *Federal financial participation.* (1) The provisions which govern Federal financial participation in assistance payments are set forth in the Social Security Act, throughout this chapter, and in other policy issuances of the Secretary. Where indicated, State plan provisions are prerequisite to Federal financial participation with respect to the applicable group and payments. State plan provisions on need, the amount of assistance, and eligibility determine the limits of Federal financial participation. Federal financial participation is excluded from assistance payments in which the State refuses to participate because of the failure of a local authority to apply such State plan provisions.

(2) The following is a summary statement regarding the groups for whom Federal financial participation is available. (More detailed information is given elsewhere.)

(i) OAA—for needy individuals under the plan who are 65 years of age or older.

(ii) AFDC—for:

(*a*) Needy children under the plan who are:

(*1*) Under the age of 18, or under 21 if regularly attending a school, college, or university, or regularly attending a course of vocational or technical training;

(2) Deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or unemployment of a father; and

(3) Living in the home of a parent or of certain relatives specified in the Act, or in foster care under certain conditions.

(*b*) The parent or other caretaker relative of a dependent child and, in certain situations, the parent's spouse.

(iii) AB—for needy individuals under the plan who are blind.

(iv) APTD—for needy individuals under the plan who are 18 years of age or older and permanently and totally disabled.

(v) AABD—for needy individuals under the plan who are aged, blind, or 18 years of age or older and permanently and totally disabled.

(3) Federal financial participation is available for assistance payments for the entire month if for any portion of the month the individual met all of the eligibility conditions imposed by Federal requirements.

(4) Federal financial participation is available in assistance payments which are continued, in accordance with the State plan, for a temporary period during which the effects of an eligibility condition are being overcome, e.g., blindness in AB, disability in APTD, physical or mental incapacity, continued absence of a parent, or unemployment of a father in AFDC.

[36 F.R. 3866, Feb. 27, 1971, as amended at 37 F.R. 12701, June 29, 1972; 38 F.R. 8744, Apr. 6, 1973; 38 F.R. 26578, Sept. 20, 1973; 39 F.R. 26912, July 24, 1974]

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§ 233.110 AFDC foster care.

(a) *State plan requirements.* A State plan under title IV-A of the Social Security Act must:

(1) Provide that aid will be given in the form of foster care for each otherwise eligible child:

(i) Who was removed after April 30, 1961, from the home of a relative specified in the AFDC plan, as a result of a judicial determination that continuance in the home of the relative would be contrary to his welfare, for any reason, and who has been placed in foster care as a result of such determination; and

(ii) (*a*) Who, in or for the month in which that court action was initiated, was receiving AFDC, or would have received AFDC if application had been made, or

(*b*) Who lived with a relative specified in the AFDC plan within 6 months prior to the month in which that court action was initiated, and who would have received AFDC in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made for him; and

(iii) Whose placement and care are the responsibility of the State agency administering or supervising the administration of the AFDC plan, or, if the State so elects, are the responsibility of any other public agency, or type or types of public agencies specified in the plan, with whom the State agency has a currently effective agreement that provides for development of a plan satisfactory to the State agency for AFDC-FC children in accordance with subparagraph (2) of this paragraph and that contains other provisions necessary to achieve the objectives of the State's AFDC plan.

(2) Provide for development of a plan for each child described in subparagraph (1) of this paragraph, so that:

(i) He will be placed in a foster family home or a child care institution in accordance with his needs;

(ii) His need for and the appropriateness of his care and services in such placement will be reviewed not less frequently than every 6 months;

(iii) Services will be provided to improve the conditions in the home from which he was removed or to make possible his placement in the home of another relative under the State's AFDC plan. (See § 220.19 of this chapter.)

(3) Provide that maximum use will be made of the services of employees of the State public welfare agency responsible for the plan for child-welfare services under title IV-B of the Act or of any local agency participating in the administration of such plan.

(4) Specify:

(i) In what types of child care institutions (private nonprofit, or public, or both), in addition to foster family homes, placement will be made; and

(ii) Whether payments will be made to foster homes and institutions only or also to other agencies.

(5) Provide that there will be specific criteria for determining the amount of payment for foster care in foster family homes and in child care institutions. In establishing rates of payment to institutions, only those items included for care in foster family homes will be included, and overhead costs of the institution will be excluded.

Under the requirements of this paragraph, provision must be made for both foster family care and institutional care in accordance with the individual child's needs; public institutions may be used, without Federal financial participation, to discharge the institutional obligation in whole or in part; and the use of institutions outside the State will also meet the requirement for the provision of institutional care.

(b) *Federal financial participation.* (1) Federal financial participation is available, effective January 1, 1968, in AFDC-FC payments not to exceed an average of $100 per month per recipient, made on behalf of children as specified

in section 403 of the Social Security Act, who are included in the approved State AFDC plan and who are placed in a foster family home, or nonprofit private child-care institution, licensed or approved by the agency which is responsible for licensing or approval of such facilities in the State where it is situated. The maximum of $100 average per month per recipient may be disregarded when the State claims Federal funds under the provisions of section 1118 of the Act.

(2) Federal financial participation is available in AFDC-FC payments made to an individual providing care in a foster family home, to a private nonprofit child care institution, or to a cooperating public or nonprofit private child placement or child-care agency.

[36 F.R. 3869, Feb. 27, 1971]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV 73-4018

Marie Clampett, individually and on behalf of her foster children. Joseph Packard, Jr., Marcus Packard, and Cynthia Packard, and Evelyn Staub, individually and on behalf of her foster children, Doyle Medicine Eagle and Timothy Medicine Eagle, and on behalf of themselves and all others similarly situated,

Plaintiffs

-vs-

John E. Madigan, individually and in his capacity as Director, State Department of Public Welfare, and his agents, representatives and assigns of the State Department of Public Welfare,

Defendants

MEMORANDUM OF DECISION

Mr. Stephen L. Pevar, of Rosebud, South Dakota appeared in behalf of the plaintiffs;

and

Mr. R.K. Krogstad, Special Assistant Attorney General of Public Welfare, of Pierre, South Dakota, appeared in behalf of the defendants.

This is a civil rights suit instituted pursuant to 42 U.S.C. Sec. 1983, seeking declaratory and injunctive relief authorized by 28 U.S.C. Secs. 2201, 2202, and by Rule 57 of the Federal Rules of Civil Procedure. Plaintiffs also seek to maintain the suit as a class action as provided by Fed. R. Civ. P. 23(a), (b)(2) & (b)(3). Jurisdiction is conferred upon this court by 28 U.S.C. Sec. 1343(3)&(4).

The plaintiffs are two similarly situated mothers who are related to the foster children residing in their homes. Marie Clampett and her husband reside in Lake Andes, South Dakota, with their five children and three foster children. The three foster children were placed there by the South Dakota Department of Public Welfare (DPW). Authority was given to make such a placement on December 1, 1972, by an order of the Rosebud Sioux Tribal Court. Public assistance payments of $144 per month were granted plaintiff Clampett upon her application for Aid to Dependent Children (ADC). Marie Clampett is the paternal aunt of the foster children, Joseph, Marcus and Cynthia Packard.

On November 1, 1972, at the conclusion of a foster home study conducted by the DPW, the Clampett home was recommended for licensing as a foster care home. *See* SDCL Secs. 26-6-9 to 26-6-11 (1967). On November 27, 1972, plaintiff Clampett requested that her foster children be removed from ADC and that she

be paid foster care payments for their care. That request was denied. At her fair hearing appeal the denial was affirmed (1) because "state foster care funds are not used to pay a relative," and (2) because six is the maximum number of children permitted to reside in a licensed foster care home, including the children of the foster parents. The Clampett home exceeded this limitation by two, precluding eligibility for foster care payments. Plaintiff Clampett has continued to receive assistance through the ADC program.

Evelyn Staub and her husband reside in Winner, South Dakota, with two foster children placed there by the DPW. Subsequent to a declaration that the two children were dependent and wards of the State, a court order issued by the Tenth Judicial Circuit of the State of South Dakota on October 1, 1972, gave the DPW custody of Doyle and Timothy Medicine Eagle. Mrs. Staub is the great aunt of these foster children. Plaintiff Staub formally requested foster care payments on February 14, 1973. Based upon the policy established by the South Dakota Public Welfare Commission, which prohibits payment of foster care funds to relatives within a certain degree, Mrs. Staub's request was denied.

Jointly, the two plaintiffs, on their own behalf and on behalf of all others similarly situated, initiated this civil rights action to enforce their Constitutional rights of due process and equal protection of the laws, as provided by the Fourteenth Amendment, and to correct an alleged deprivation of their rights granted under the Social Security Act of 1935. 42 U.S.C. Sec. 301 *et seq.* Their requests for a temporary restraining order and a preliminary injunction have been denied. A hearing for

a permanent injunction was held and the plaintiffs submitted a brief. The defendants waived filing a brief, preferring to rely upon their oral argument and a reproduced copy of that portion of the Manual of the South Dakota State Department of Public Welfare regulations pertaining to foster care to explain their position.

The State of South Dakota has a state-wide foster care program. That program, as evidenced by the Manual of the South Dakota State Department of Public Welfare (hereinafter "Manual") is financed by a number of separate and independent sources, each containing their own prerequisites which must be complied with before their funds are available. These various sources of revenue, which provide the support for foster children, are all administered locally by the DPW and subject to its regulations. *See* Manual of the South Dakota State Department of Public Welfare Part IV-5F. The State's funds (State Foster Care) are used to supplement these diverse sources of funding. One such source of funding the State may look to for support of a dependent child is ADC Foster Care (Federal Foster Care), representing the federal contribution to this State program. However, to be eligible for Federal Foster Care the foster child must comply with that program's listed requirements. Manual at IV-5F-12 to 14. The State Foster Care funds are also subject to certain other limitations.

The State regulation in issue provides that "State foster care funds are not used to pay a relative." Manual at IV-5F-14. A "relative" under these circumstances is a:

a) father; mother; grandfather; grandmother; brother; sister; stepfather; stepmother; stepbrother; stepsister; uncle; aunt; first cousin; nephew or niece; including those of half-blood.

b) relatives of the preceding generation denoted by prefixes of grand or great, as specified in subparagraph (a).

c) * * *

d) * * *

See Manual at IV-5F-13 & 14.

It is this State administered program, with its accompanying State regulations, which has come under attack by the plaintiffs.

The plaintiffs contend that they are being denied the economic advantages of foster care payments because they are related to the foster children placed in their homes. They reason that a system of aid which allows more money for the placement of foster children in entirely strange homes, rather than with relatives, tends to economically induce the placing of dependent children in unrelated foster homes and, consequently, denies the child the benefit of social and psychological ties already present within the existing family structure. Currently, the foster children in question receive approximately $38 per month on ADC. If they were found eligible for foster care payments under the State's regulations, plaintiffs would receive $65 per month, with an additional allowance for clothing. Manual at IV-5F-15.

The plaintiffs assert in their amended complaint that the exclusion of relatives from the foster care program was established by the South Dakota Public Welfare Commission and is in violation of the Social Security

Act of 1935 because: (1) it discourages the maintenance of a family life between dependent children and related foster parents contrary to the stated purpose of the Social Security Act, 42 U.S.C. Sec. 601; and (2) Title IV-5F of the DPW's Manual violates the Social Security Act because its regulations do not determine need and the amounts of assistance for *all* applicants on an objective and equitable basis as demanded by the United States Department of Health, Education and Welfare's (HEW) regulations. 45 C.F.R. Sec. 233.20(a)(1).

I am persuaded by the plaintiffs' arguments and agree with their contentions. In addition, I find that the most efficient method for correcting the state-wide application of this regulation is to permit the plaintiffs to proceed as a class pursuant to Fed.R.Civ.P. 23(a), (b)(2). The plaintiffs are representative of that class of people who, as relatives of foster children not legally obligated for such children's support, are being denied foster care assistance by the defendants as directed by the DPW's regulation. Manual at IV-5F-14.

The State of South Dakota has chosen to participate in the provisions of the Social Security Act of 1935, 42 U.S.C. Sec. 301 *et seq.* States desiring the advantages of the substantial federal funds available in administering categorical assistance programs must conform with the requirements of the Social Security Act and with the rules and regulations promulgated by HEW. King v. Smith, 392 U.S. 309, 317, n.34, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968). South Dakota has chosen to participate in this federal program and has provided for receipt of the federal monies disbursed thereunder. SDCL 26-4-10 (Supp. 1973).

That portion of the Social Security Act of immediate concern to these plaintiffs is the part authorizing Aid to Families With Dependent Children (AFDC), 42 U.S.C. Secs. 601 *et seq.*, denominated Aid to Dependent Children (ADC) under South Dakota law. SDCL Chapter 28-7 (1967).

Congress expressed its purpose for enacting the AFDC program at 42 U.S.C. Sec. 601.

> For the purpose of encouraging the care of dependent children in their own homes *or in the homes of relatives* by enabling each State to furnish financial assistance and rehabilitation and other services, . . . , to needy dependent children and the parents *or relatives* with whom they are living to help maintain and strengthen family life and to help such parents *or relatives* to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, ... (emphasis added.)

This purpose has been defeated by the provisions of Title IV-5F of the DPW's Manual. Keeping in mind the economic realities of raising foster children, the South Dakota regulations discourage relatives from opening their homes to related dependent children by refusing to pay related foster parents the same amounts paid to unrelated foster parents. The State has determined that $65 per month, plus a clothing allowance, is necessary to adequately support a foster child. Manual at IV-5F-15. Nevertheless, under a regulation promulgated by the Public Welfare Commission, if the foster home is that of a relative, foster care funds are denied to those substitute parents and other assistance must be sought. This pecuniary distinction is imposed upon related

foster parents even though they are not legally obligated to support the dependent child prior to placement, SDCL Chapter 25-7, as amended, and in spite of the well-recognized fact that "it costs more to support a child in a foster home than in his own home." Ramos v. Montgomery, 313 F.Supp. 1179, 1182 (S.D.Cal. 1970), *aff'd.* [illegible] 400 U.S. 1003 (1970); *see also* Senate Report No. 744, 2 U.S. Code Cong. & Admin. News 2834, 3001 (1967). The State, once having determined that a foster child requires $65 per month for adequate support, "may not assume that a (welfare) recipient's relatives, not legally responsible for his support, will charge less than other persons providing (similar care)." Harotti v. White, 342 F.Supp. 823, 826 (D.Conn. 1972).

The plaintiffs' second contention, establishing a conflict between South Dakota's regulatory scheme and the HEW regulations promulgated pursuant to the Social Security Act, pertains to the requirements for State plans receiving federal financial participation. In particular, 45 C.F.R. Sec. 233.20 directs "that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis . . . ." The defendants did not address themselves to this specific issue and, in any event, this court feels their argument would be frivolous in light of the well-reasoned opinions cited by plaintiffs in their brief.

The defendants have sought, generally, to justify the foster care payment differential by pointing out that their definition of "foster care" calls for a "social service which provides substitute care for a child for a planned period outside his own *or a relative's home* when his own family cannot care for him for a temporary or extended period." (emphasis added)

Manual at IV-5F-1. Thus, as I interpret the defendant's argument, by definition the relatives of dependent children, children who have otherwise qualified for South Dakota's foster care program, are precluded that financial assistance found necessary to adequately support a foster child solely because of this familial tie; a kinship which under South Dakota law incurs no legal obligation to support and care for those dependent children until placed there by the DPW. This argument is unpersuasive and fails to justify the State's discrimination.

This court finds that a conflict exists between the stated purpose of the Social Security Act of 1935 along with the regulations promulgated thereunder, and the South Dakota foster care regulations. The discrimination in payments between the two classes of otherwise similarly situated foster parents discourages the rehabilitation of a child's family life with relatives, and to this extent the State welfare regulations are inconsistent with the Social Security Act. Therefore, this court finds for the plaintiffs and enjoins the defendants from denying foster care payments to otherwise qualified applicants solely because the foster parent is related within a certain degree to the foster child.

Plaintiff Marie Clampett, under the facts of this decision, would be eligible for foster care payments for one of her foster children. Plaintiff Evelyn Staub is eligible for foster care for both of her foster children. Plaintiffs will submit an order in conformity with this memorandum decision.

Done and entered at Sioux Falls, South Dakota, this 24th day of May, 1973.

BY THE COURT:

FRED J. NICKOL
Chief Judge

Supreme Court, U. S.
FILED
AUG 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6935

MARCEL YOUAKIM and LINDA YOUAKIM individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend, LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend, LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend, LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend, LINDA YOUAKIM, and all others similarly situated,

Plaintiffs-Appellants,

vs.

JEROME MILLER individually and as Director of the DEPARTMENT OF CHILDREN AND FAMILY SERVICES and the DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF AND ARGUMENT FOR DEFENDANTS-APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6935

MARCEL YOUAKIM and LINDA YOUAKIM individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend, LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend, LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend, LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend, LINDA YOUAKIM, and all others similarly situated,

Plaintiffs-Appellants,

vs.

JEROME MILLER individually and as Director of the DEPARTMENT OF CHILDREN AND FAMILY SERVICES and the DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF AND ARGUMENT FOR DEFENDANTS-APPELLEES

OPINION BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 374 F. Supp. 1204 (1974) and is reproduced in full in the Appendix at page 50.

JURISDICTION

These proceedings were instituted when the plaintiffs filed a class action in the United States District Court for the Northern District of Illinois, Eastern Division, pursuant to 28 U.S.C. §§ 1343 (3), (4), 1281 and 1284. Plaintiffs sought injunctive relief in accordance with their claim under the Civil Rights Act (42 U.S.C. § 1983), contending that the foster home provisions of the Illinois Child Care Act, Ill. Rev. Stat. 1971, ch. 23, §§ 2212.05, 2212.17 and 5005 were unconstitutional.

The three-judge district court, convened to hear this matter, treated defendants' Motion to Dismiss the action as a Motion for Summary Judgment under F.R.C.P 12(b) and granted defendants' motion for Summary Judgment on February 28, 1974. Plaintiffs filed their Notice of Appeal on April 23, 1974.

Plaintiffs have invoked the jurisdiction of this Court to review the decision of the three-judge district court by virtue of 28 U.S.C. §§ 1253 and 2281. This Court noted probable jurisdiction on March 17, 1975.

QUESTIONS PRESENTED

1. Whether the Illinois statutory foster care scheme which provides $105 per month in monetary assistance benefits to foster parents caring for unrelated children, while providing $63 per month in assistance to relatives caring for related children is consistent with the purpose and meaning of the Social Security Act and, therefore, the Supremacy Clause of the United States Constitution?

2. Whether the Illinois statutory foster care scheme complies with the requirements of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

U.S. Const., art. VI;
U.S. Const., amend. XIV;
42 U.S.C. § 601;
42 U.S.C. § 602;
42 U.S.C. § 603;
42 U.S.C. § 605;
42 U.S.C. § 606;
42 U.S.C. § 608;
45 C.F.R. § 233.90(c)(1)(v) (1974);
45 C.F.R. § 233.90(c)(2) (1974);
45 C.F.R. § 233.110 (1974);
Ill. Rev. Stat. 1971, ch. 23, §§ 4-1 to 4-11;
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Ill. Rev. Stat. 1971, ch. 23, § 2212.17;
Ill. Rev. Stat. 1971, ch. 23, § 5001;
Ill. Rev. Stat. 1971, ch. 23, § 5005;
Ill. Rev. Stat. 1971, ch. 37, § 701-2(1);
(See Supplement in back of this brief for reproduction of statutes.)

SUMMARY OF ARGUMENT

I. The Illinois statutory foster care scheme which distinguishes between relatives caring for related children and strangers who act as foster parents is consistent with the Social Security Act and the Supremacy Clause of the United States Constitution.

The basic AFDC program established by the Social Security Act (42 U.S.C. §§ 601-606) provides aid to needy children who live with their parents and certain close relatives, while the supplemental AFDC-FC program (42 U.S.C. § 608) provides aid to children who are removed by court order from the homes of these persons and placed in foster family homes or child-care institutions.

The distribution of public aid funds by the State of Illinois parallels the federal welfare program. Under Illinois law, essentially the same class of relatives designated in the Social Security Act is eligible for public aid under the state AFDC program, whereas AFDC-FC assistance is administered under a separate program which defines a "foster family home" as a residence which receives unrelated children. Since plaintiffs care for needy children who are related to them, they have received public assistance under the AFDC program rather than under the foster care program. This procedure was properly upheld by the three-judge district court which heard the case below.

A. As in *Dandridge* v. *Williams*, 397 U.S. 471, 25 L. Ed. 2d 491 (1970), the question of plaintiffs' eligibility to receive some public assistance is simply not involved. The defendant has not attempted to deprive plaintiffs or persons similarly situated from receiving public assistance, but, rather, has determined them to be eligible under AFDC. Once the federal requirement that all eligible per-

sons receive some aid is fulfilled, the federal statute grants broad discretion to the individual states regarding the amount of benefits to be paid to public aid recipients. The State of Illinois has determined that its citizens' standard of need under AFDC is approximately $63 per month, and 100% of this need is paid to recipients by the state. A higher amount has been allocated under AFDC-FC in order to provide an incentive to strangers to care for dependent children unrelated to them. This difference, however, does not affect plaintiffs' eligibility under the AFDC program.

B. The Social Security Act itself distinguishes between foster parents and related persons who care for a child. First, a higher dollar amount of assistance is allocated to foster home care under the federal statute. Secondly, throughout the basic AFDC provisions, parents and close relatives are consistently treated as one unit, while "foster care" and "child-care institutions" comprise another separate unit under the AFDC-FC provision.

While it is unquestionably the predominant purpose of the AFDC program, as set forth in § 601, to insure that whenever possible dependent children will be cared for in homes provided by close relatives, certain other sections clearly show that Congress has become increasingly responsive to the much broader concern of the care and protection of children generally. Section 606(b) is particularly pertinent in that it provides for "protective payments" to be made to other interested persons when the child's welfare is jeopardized by an irresponsible parent or relative. It also requires states which participate in the federal program to provide for foster care to remedy situations where the conditions in the child's home prove unsuitable. Appropriately, § 608 defines a dependent child as one who has been removed from the home of a relative by court order and who is subsequently placed in a foster home or

a child-care institution. Congress could not have intended to merely duplicate federal assistance which was already provided under AFDC to parents and close relatives of dependent children. Rather, the newer AFDC-FC program was meant to remedy those situations where related care for dependent children is either unavailable or inadequate by providing a less desirable but necessary alternative to care in the child's own home in the form of foster care.

C. The legislative history of the Social Security Act indicates that Congress intended the foster care program to function simply as a supplement to the regular AFDC program. Since the origin of the Social Security Act, AFDC payments have been administered under Title IV, whereas aid to foster children was first administered in a less structured fashion through a completely distinct program under Title V. It was only in 1961 that the states were given the option of bringing dependent children in need of foster care into the federally aided program under Title IV. This new legislation followed a recognition by Congress that while some home environments are contrary to the best interests of children, remedial action was not possible unless the states were granted additional funds in order to provide for care of the child in a foster family home when necessary. The Senate Committee also expressed the intent that individual states should determine the appropriate amount of aid to be granted to the providers of foster care.

Therefore, the Illinois practice of treating related persons separately from foster parents, and of granting a higher level of payments to foster home care, conforms to the underlying purpose and meaning of the Social Security Act.

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D. Since plaintiffs are related to the needy children for whom they care, the state has properly determined that they should not be regarded as foster parents under the federal welfare program. This Court has emphatically rejected the method of statutory construction which results in a presumption that because plaintiffs are not expressly excluded from AFDC-FC coverage under the federal statute, they are thereby included in its coverage. Under the preferred method of statutory interpretation, whereby words are given their ordinary meaning, foster parents are persons who offer care, nursing and rearing to children even though they are not related by blood. This definition was implicitly accepted by the Supreme Court in a recent case, as well as by the three-judge district court below. Even though the present position of HEW regarding foster care conflicts with this definition, it was nevertheless explicitly accepted by HEW in the past, both in the official regulations contained in C.F.R. and in a letter by HEW affirming the position of the State of Illinois that plaintiffs simply are not foster parents, and are consequently not entitled to foster care benefits under AFDC-FC.

Since the Illinois statutory foster care scheme is consistent with the Social Security Act and the Supremacy Clause of the United States Constitution, this Court should affirm the three-judge district court's entry of summary judgment for the defendants.

II. The Illinois statutory foster care scheme which provides monetary assistance to strangers caring for unrelated children at $105 per month while providing assistance of $63 per month to relatives caring for related children complies with the requirements of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The three-judge district court properly employed the traditional "minimum scrutiny, rational relationship" standard of review to this case and found that the Illinois welfare scheme is based upon legitimate state purposes, and that the allocation of welfare funds made by the state bears a relationship to the legitimate purposes upon which the program is grounded. The district court recognized that the Illinois Department of Children and Family Services was created to protect and care for homeless dependent or neglected children and to promote their general welfare. Consistent with that purpose is making available as many foster homes as possible so that those children who cannot live with natural parents or relatives may have a foster home in which to live. The district court correctly found that payment of a premium to strangers caring for unrelated children, over and above the general assistance available to relatives caring for related children, would make the maximum number of foster homes available since a natural parent or relative is likely to care for a child out of a sense of family obligation, whereas a stranger has no such similar motivation. The district court logically concluded that it was reasonable for the State of Illinois to adopt a program designed to induce families who would not otherwise become foster parents to assume that role.

The district court also found a valid secondary state interest which is rationally related to the purposes of the Illinois welfare statutes. The payments which are the subject of this litigation are intended to subsidize care for children who have been adjudicated wards of the state. The district court recognized that there are many children in Illinois whose natural parents are deceased, who are cared for by relatives without having been adjudicated wards of the state. If plaintiffs' attack on the Illinois wel-

fare scheme is successful, relatives will have a financial inducement to have the related children they care for adjudicated wards of the state. Such a state of affairs is contrary to the best interests of the children involved and contrary to the valid state interest of encouraging relatives to care for related minors without having them adjudicated wards of the state. Therefore, the Illinois statutory foster care scheme does not violate the equal protection rights of the plaintiffs.

The plaintiffs erroneously argue for the application of a more stringent standard of equal protection review. Such a standard of review is not applicable here, since plaintiffs are not members of an inherently suspect class nor is a protected fundamental interest of plaintiffs involved. Under these circumstances a more stringent standard of equal protection review than the traditional "minimum scrutiny, rational relationship" test has no application.

Since the Illinois welfare scheme in question is consistent with the Social Security Act and complies with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, this Court should affirm the three-judge district court's entry of summary judgment for the defendants.

ARGUMENT

I.

THE ILLINOIS STATUTORY FOSTER CARE SCHEME IS CONSISTENT WITH THE PURPOSE AND MEANING OF THE SOCIAL SECURITY ACT, AND DOES NOT, THEREFORE, VIOLATE THE SOCIAL SECURITY ACT OR THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

Introduction

Like every other state in the Union, Illinois has chosen to participate in the Federal Aid to Families With Dependent Children welfare program (AFDC, 42 U.S.C. § 601 *et seq.*). Originating with the Social Security Act of 1935, this program provides aid to families with dependent children where such children are deprived of parental support because a parent is absent from the home, incapacitated or dead, and the children are living with either their natural parents or with certain relatives specified in 42 U.S.C. § 606.[1] In addition to this basic program, Congress, in 1961, extended the AFDC program to include dependent children of unemployed fathers (AFDC-E, 42 U.S.C. § 607), and at the same time, the AFDC-FC program was established (42 U.S.C. § 608) to provide aid to children who

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1. Section 606(a) specifies the following relatives in addition to father and mother as being within the ambit of the AFDC program laid out in § 606: grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece.

were removed by court order from the homes of those relatives designated in § 606 and placed in foster family homes or in child-care institutions.

This case involves the interaction of the AFDC (42 U.S.C. § 606) and AFDC-FC (42 U.S.C. § 608) programs. Like AFDC, the federal welfare program providing aid for foster care (AFDC-FC) depends on a combination of federal and state funds, and is administered by the states under regulations promulgated by the Department of Health, Education and Welfare (HEW) pursuant to the statutory authority delegated to it by the Congress. The Supreme Court has emphasized on numerous occasions that while each state may refuse to participate in the federal program (including both AFDC and AFDC-FC), once a state decides to participate, it is mandatory that it maintain a system consistent with the Social Security Act. *Townsend* v. *Swank,* 404 U.S. 282, 30 L. Ed. 2d 448 (1971); *Rosado* v. *Wyman,* 397 U.S. 397, 25 L. Ed. 2d 442 (1970); *King* v. *Smith,* 392 U.S. 309, 20 L. Ed. 2d 1118 (1968). Therefore, as a participant in the AFDC and AFDC-FC programs, the State of Illinois, as well as every other participating state, has an obligation to disburse welfare funds in a manner consistent with the stated requirements of the federal welfare program, as well as its underlying purposes and policies.

In accordance with the Illinois administrative welfare scheme, the AFDC program is administered by the Illinois Department of Public Aid (Ill. Rev. Stat. 1971, ch. 23, §§ 4-1 to 4-11) while the AFDC-FC program is administered separately by the Illinois Department of Children and Family Services (Ill. Rev. Stat. 1971, ch. 23, § 5001 *et seq.*).

Under the AFDC program, needy children who are living with their parents or certain relatives specified in § 4-1.2,[2] are entitled to monthly assistance of approximately $63 while under the AFDC-FC program needy children who are living with unrelated foster parents (pursuant to Ill. Rev. Stat. 1971, ch. 23, §§ 2212.05 and 2212.17)[3] are entitled to monthly benefits of approximattly $105. Either group of needy children and the families with which they live may be entitled to additional monthly assistance, over and above their basic allotment, upon a showing of special need.[4]

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2. Section 4-1.2 (Ill. Rev. Stat. 1971, ch. 23, § 4-1.2) of the Illinois statute includes within the ambit of the basic AFDC program essentially the same class of relatives as provided for in § 606(a) of the Social Security Act. In addition to father or mother, § 4-1.2 of the Illinois statute specifies that the child or children must be living with one of the following relatives: grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt, or other relative approved by the Department.

3. Section 2212.05 defines a "facility for child care" as "any person, group of persons, agency, association or organization . . . who or which receives or arranges for care or placement of one or more children, unrelated to the operator of the facility. . . ." Section 2212.17 defines a "foster family home" as "a facility for child care in residences of families who receive no more than 8 children unrelated to them. . . ."

4. *See* DCFS manual which provides that a child living with a relative may be paid up to the full foster care rate of $105 upon a showing of need. (App. 36-37)

The dispute in this case involves plaintiffs' contention that they necessarily are included within the class of "foster parents" set out in the supplemental AFDC-FC program rather than the class of "relatives" set out in the basic AFDC program, even though they are related to the needy children for whom they care, and thus are covered under the regular AFDC program set out in § 606. Plaintiffs, therefore, claim to be entitled to monthly assistance of $105 per month rather than to the $63 per month allocated under the basic AFDC program. The defendants respectfully submit that the premise upon which plaintiffs' case is based is erroneous and that the AFDC and AFDC-FC programs as administered by the State of Illinois, which distinguish between relatives caring for related children and strangers who act as foster parents, are consistent with the requirements of both the Social Security Act and the long-standing policy of HEW.

A. Illinois Law Does Not Impose An Eligibility Standard For AFDC-FC Assistance Which Is Incompatible With The Social Security Act.

While not actually stated, plaintiffs' contention rests essentially upon § 602(a)(10) of the Social Security Act which requires that aid be promptly provided to "all eligible individuals." It is claimed by plaintiffs that the classifications established by the Illinois law, which exclude relatives from the definition of foster parents, "*deny eligibility* to a sub-group of foster children."[5]

5. It should be noted that plaintiffs inaccurately characterize themselves throughout their brief as a class of persons who are denied eligibility rather than as a class of persons who are eligible for assistance under the basic AFDC program provided for in 42 U.S.C. § 606. Plaintiffs were and presumably still are eligible for assistance under the basic AFDC program.

(Plaintiffs' brief, p. 19) (emphasis added) Allegedly, the "bar" to payment of AFDC-FC funds to children living with persons related to them is an attempt by Illinois to engraft "an additional condition of eligibility onto the federal scheme." (Plaintiffs' brief, p. 21; see also pp. 11-12). Several United States Supreme Court decisions are cited to support the position that "[t]he state cannot *deny assistance* to persons, like Plaintiffs, whom the federal law defines as eligible to receive it." (Plaintiffs' brief, p. 24) (emphasis added)

The defendants willingly acknowledge that every state must comply with the § 602(a)(10) requirement of prompt payment to all eligible persons. *Townsend* v. *Swank*, 404 U.S. 282, 30 L. Ed. 2d 448 (1971); *Lewis* v. *Martin*, 397 U.S. 552, 25 L. Ed. 2d 561 (1970); *Dandridge* v. *Williams*, 397 U.S. 471, 25 L. Ed. 2d 491 (1970); *King* v. *Smith*, 392 U.S. 309, 20 L. Ed. 2d 1118 (1968). Likewise, it is not questioned that eligibility for AFDC or AFDC-FC is to be determined by reference to the federal eligibility standards rather than by each individual state's preference. *Townsend* v. *Swank*, 404 U.S. 282, 30 L. Ed. 2d 448 (1971). The defendants maintain that the State of Illinois has properly applied the federal eligibility standards to the plaintiffs in this cause and appropriately found them eligible for AFDC in the amount of $63 per month rather than AFDC-FC in the amount of $105 per month. An examination of the federal eligibility standards and their application to plaintiffs clearly supports this claim.

Under § 601 of the Social Security Act, federal appropriations are authorized to enable each state to furnish financial assistance to "needy dependent children" and to the parents or relatives with whom those children are living. Sections 606, 607 and 608 define "needy dependent

children," and all persons included within those sections are eligible for assistance. Under § 606, a dependent child is one who is deprived of parental support or care by reason of the death, continued absence, or physical or mental incapacity of a parent; who is living with his father, mother, or certain specified relatives; and who is under 18 years of age, or under 21 and is a student. A similar standard of eligibility appears in § 607, except that the child covered under this section has been deprived of parental care or support because of the unemployment of his father, rather than by death, absence or incapacity of a parent as set out in § 606. Next, Section 608 defines a "dependent child" as one who would otherwise meet the requirements of § 606 or § 607 except that he has been removed by judicial order from the home of a relative designated in § 606 and has been placed in a foster home or in a child-care institution. If a child fits into any one of these categories, he is considered by federal standards an "eligible individual," entitled to share in federal welfare funds.

The defendants recognize that in numerous instances, the Supreme Court has struck down attempts by the states to exclude eligible persons from welfare benefits in violation of the Social Security Act. In *King* v. *Smith,* 392 U.S. 309, 20 L. Ed. 2d 1118 (1968) this Court struck down an Alabama statute which denied AFDC benefits to the mother of any child who cohabited with a man (substitute father) inside or outside of her home because the statute defined "parent" in a manner inconsistent with 42 U.S.C. § 606(a). Similarly in *Townsend* v. *Swank,* 404 U.S. 282, 30 L. Ed. 2d 448 (1971) an Illinois statute and regulation which denied AFDC benefits to children between the ages of 18 and 20 who attended colleges and universities were struck because they defined "institutions of higher education" in a manner inconsistent with federal law. The Court in *Carleson* v. *Remillard,* 406 U.S. 598, 32 L. Ed. 2d 352 (1972) struck a California statute which denied AFDC benefits to families in which the father was absent from the home on account of military duty as being inconsistent with the federal definition of "continued absence from the home" contained in 42 U.S.C. § 606(a). Most recently in *Van Lare* v. *Hurley,* —— U.S. ——, 44 L. Ed. 2d 208 (1975) this Court held invalid a New York regulation which resulted in a reduction or complete loss of an AFDC recipient's shelter allowance based upon a lodger's presumed but unproven contribution to the household, because it conflicted with the federal definition of "available income."

In contrast to these cases, the Illinois welfare scheme does not exclude the plaintiffs from eligibility for assistance, nor does it engraft an additional eligibility requirement on the federal scheme as suggested by the plaintiffs. The Illinois scheme simply parallels the federal one in determining whether an applicant for assistance is eligible under 42 U.S.C. § 606 (AFDC) or 42 U.S.C. § 608 (AFDC-FC). In this case, plaintiffs are eligible under § 606 rather than § 608—thus, there is no conflict with federal eligibility standards as presented by the above-cited decisions of this Court.

Plaintiffs' real contention, therefore, appears to concern itself with the *amount* of aid received rather than eligibility to receive aid. The Supreme Court has held in this regard that ". . . the starting point of the statutory analysis must be a recognition that the federal law gives each State great latitude in dispensing its available funds." *Dandridge* v. *Williams,* 397 U.S. 471, 478, 25 L. Ed. 2d 491, 498 (1970). It is imperative to first note that nowhere does the federal statute require a participating state to provide any specific amount of aid, nor does it require the state to provide a greater amount of assistance to "fos-

ter parents" than to natural or related parents. While Congress has made additional funds available to states which choose to provide higher payments for foster care (§ 603(a)(1)(B)), section 602(a)(10) only requires that the state promptly *provide aid* to all individuals who are eligible. The Supreme Court has held that section to require no more than that all needy children receive *some* aid, and further, that "[s]o long as some aid is provided to all eligible families and all eligible children, the [Social Security Act] itself is not violated." *Dandridge* v. *Williams,* 397 U.S. 471, 481, 25 L. Ed. 2d 491, 499 (1970).

Secondly, once the requirement that all eligible persons receive some aid is fulfilled, the federal statute leaves the level of benefits and the determination of the "standard of need" of eligible families within its borders to the judgment of the state. *Id.* at 478-80, 25 L. Ed. 2d at 498-99. The authority given the states to set the level of benefits payable under their respective AFDC plans stems from § 601 of the Social Security Act, which states that the purpose of the federal AFDC appropriation is to enable each state to "furnish financial assistance and rehabilitation and other services, *as far as practicable under the conditions in such State. . . .*"[6] *Id.* at 478, 25 L. Ed. 2d at 498. (Court's emphasis) Hence, "[t]here is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." *King* v.

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6. "Congress was itself cognizant of the limitations on state resources from the very outset of the federal welfare program." *Dandridge* v. *Williams,* 397 U.S. 471, 478, 25 L. Ed. 2d 491, 498 (1970).

Smith, 392 U.S. 309, 318-19, 20 L. Ed. 2d 1118, 1126 (1968). *Jefferson* v. *Hackney,* 406 U.S. 535, 541, 32 L. Ed. 2d 285, 293 (1972).

Plaintiffs' contention, therefore, that "[t]he child has a *right to full State support* adequate to meet his needs" and impliedly that failure to provide such support violates the Social Security Act, is without an authoritative basis. (Plaintiffs' brief, p. 11) (emphasis added) A citizen has never had an inherent right to complete fulfillment of his needs by the government. (*See Jefferson* v. *Hackney,* 406 U.S. 535, 32 L. Ed. 2d 285 (1972); *Dandridge* v. *Williams,* 397 U.S. 471, 25 L. Ed. 2d 491 (1971)). The legislative history of the Social Security Act makes it clear that federal participation in state welfare programs stemmed precisely from the fact that the states were unable to even approach a level of assistance equal to individual needs. (*See* S. Rep. No. 628, 74th Cong. 1st Sess. 17-19 (1935)) Presently, as in the past, a state can altogether refuse to participate in the federal welfare program, and thus deprive its citizens of a share in these federal funds. Again, even by participating, there is no requirement that the state fully meet the needs of its citizens. The Supreme Court has noted with approval the various methods by which the states have chosen to meet the needs of its less fortunate citizens:

> Some States provide that every family shall receive grants sufficient to meet fully the determined standard of need. Other States provide that each family unit shall receive a percentage of the determined need. Still others provide grants to most families in full accord with the ascertained standard of need, but impose an upper limit on the total amount of money any one family unit may receive.

Dandridge v. *Williams*, 397 U.S. 471, 473, 25 L. Ed. 2d 491, 495 (1970).[7]

The State of Illinois has determined that its citizens' standard of need is approximately $63 per month. The state pays 100% of need, so that each eligible person receives the full $63 amount.[8] The fact that plaintiffs find this level of benefits inadequate to meet their particular needs does not provide a sound basis for arguing that the Illinois statute conflicts with federal law. Nor is a conflict presented because the state has deemed it necessary to provide larger payments than this minimum level to a group of persons (unrelated foster parents) who otherwise would have no incentive to care for dependent children. In *Ramos* v. *Montgomery*, 313 F. Supp. 1179 (S.D. Cal. 1970), the State of California set $48 per month as the minimum amount of AFDC assistance to be provided to eligible individuals. However, where a dependent child was placed in a foster home, that home was eligible to receive a higher payment of $105 for foster care. The district court held that the pro-

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7. In *Dandridge*, the recipients all had large families. Their standard of need as computed by the state substantially exceeded the maximum grants that they actually received under the state welfare program. The Court concluded that the state regulation was permissible under federal law.

8. As previously noted, any recipients, like plaintiffs, are eligible to receive a higher amount based upon a showing of special need. *See DCFS* manual (App. 36-37)

vision permitting the larger payment was not contrary to federal law.[9] This decision of the district court was subsequently affirmed by the United States Supreme Court. (400 U.S. 1003, 27 L. Ed. 2d 618 (1971)).

In summary then, plaintiffs are not denied eligibility under the AFDC program by the Illinois welfare scheme but rather are determined to be eligible for assistance as relatives caring for "needy dependent children" as set out in 42 U.S.C. § 606. While it is true that the assistance levels provided in this program result in the minimum $63 per month payments, whereas the levels for unrelated foster care permit higher payments of $105 per month, this difference neither denies plaintiffs eligibility under the AFDC program nor does it conflict with the Social Security Act.

B.

The Plain Meaning Of The Social Security Act Indicates That Congress Intended To Provide AFDC Assistance To Needy Children Cared For By Relatives, Such As Plaintiffs, Through § 606 Rather Than Through The Foster Care Program Contained In § 608.

By isolating certain words ("any individual") and certain sections (608(b); last paragraph of § 608) of the AFDC provisions, plaintiffs reach the mistaken conclusion that the Social Security Act mandates the granting of full AFDC-FC benefits to children living in homes maintained by relatives. (Plaintiff's brief, pp. 20-22) However, in in-

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9. While the determination by the State of Illinois to make higher payments, following a court order, to strangers than to relatives who care for children could conceivably raise a constitutional question of equal protection (see *Townsend* v. *Swank*, 404 U.S. 282, 30 L. Ed. 2d 448 (1971)), it in no way affects plaintiffs' eligibility to receive assistance so as to conflict with the Social Security Act.

terpreting a statute, the Court is not guided by a single sentence or member of a sentence, but must look to the provisions of the whole law, to its object and policy. *Philbrook* v. *Glodgett,* ——U.S.——, 44 L. Ed. 2d 525, 532-33 (1975); *Richards* v. *United States,* 369 U.S. 1, 11, 7 L. Ed. 2d 492, 499 (1962).

Accordingly, the three-judge district court which decided the case below determined that, far from being inconsistent with the federal welfare scheme, the Illinois statutory scheme implementing AFDC "in general seems to parallel it." *Youakim* v. *Miller,* 374 F. Supp. 1204, 1210 (N. D. Ill. 1974). The court based this determination on two factors: (1) the federal statute makes the same classification as the Illinois statute, in that the federal statute authorizes aid to the natural parents and relatives of dependent children in one section (42 U.S.C. § 606), and aid to foster parents in another section (42 U.S.C. § 608); and (2) that, like the Illinois statute, the federal plan allocates more money to foster care payments than to regular AFDC payments. (Citing § 603(a)(1)(B); *Ramos* v. *Montgomery,* 313 F. Supp. 1179, 1182 (S. D. Cal. 1970).

Since § 603(a)(1)(B) clearly authorizes greater money payments for foster care, the district court's determination in this regard is correct. The allocation of higher funds was first made in 1967, following a recognition by Congress that "[f]oster care for children is relatively costly, and States have reported that they cannot finance it without some additional Federal help." (S. Rep. No. 744, 90th Cong., 1st Sess. (1967) U.S. Cong. & Adm. News V. 2. 3000) The Senate Committee stated that "[f]ederal sharing will be possible in payments up to $100 a month . . . for children in foster care," (*Id.* at 3001) in order to provide "more favorable Federal matching . . . for foster care for children *removed from an unsuitable home* by court order." *Id.* at

2837-38. (emphasis added) It should be noted once again that § 608(a) defines a foster child as one who has been *removed from the home of a relative* by a judicial determination that continuation therein would be contrary to the welfare of the child. Further comments of the Senate Committee are enlightening:

> The committee believes that the AFDC program *already offers* an opportunity for States to receive Federal financial assistance in the cost of care for many children who have no parents or who are not able to live with their parents. Under AFDC, children are eligible for assistance only if they are living with one or more specified relatives. . . . Federal sharing is available to reimburse the relative for the cost of providing a home for the child. . . .
>
> Under the committee bill, Federal funds will be available on a more liberal basis *than for the basic program* [which includes relatives caring for an indigent child] out of a recognition that foster family care is more costly than care in the child's home. . . . These liberalizations will be of material assistance to States and localities and will facilitate plans being developed for children based on the need of the child rather than the fiscal condition of the local government. *Id.* at 3001-02.

It is evident from these comments that Congress intended to treat the foster care program separately and more favorably than the regular AFDC program, which has included related care since the inception of the Social Security Act in 1935. Consequently, the district court's interpretation that the federal statute classifies parental and related care separately from foster care is also correct.

Even a cursory examination of the AFDC provisions reveals that the terms "parent" and "relative" are consistently used as one unit, while the terms "foster care" and "child-care institutions" regularly appear together as

another separate unit in § 608. As noted above, §§ 601 through 606 constitute the basic AFDC program; § 607 was later added to extend AFDC to reach children of unemployed fathers, and § 608 was added to extend AFDC to children being cared for in the homes of persons unrelated to them or in child-care institutions. The purpose of the basic program, as stated in § 601, is to help maintain and strengthen family life by encouraging the care of dependent children in the homes of their parents, or alternatively, in the homes of relatives. The subsequent sections pertaining to AFDC provide the mechanism by which this goal is to be achieved. It is noteworthy that each section regards certain relatives on an equal basis with the natural parent.

For example, § 602(a)(7) provides that the state agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children; § 602(a)(19) provides that every individual receiving assistance must register for manpower services, training or employment, unless such individual is a mother or other relative of a child under the age of six who is caring for the child; § 605 provides for counseling and guidance to relatives who are unable to manage the use of welfare payments for the benefit of the child; § 606(a) identifies those relatives included in AFDC, and § 606(c) defines the term "relative with whom any dependent child is living." There is no question that natural parents and close relatives conceptually constitute one complete category of AFDC recipients.

Section 606(b) is especially pertinent because, in defining the term "aid to families with dependent children," it reflects a recognition by Congress that while the home of a parent or relative remains the ideal environment for the child, the difficulties sometimes encountered in maintaining and strengthening "family life" require other alternatives.

Section 606(b) provides three important safeguards for the protection of the child: first, a number of precautions are directed at keeping the child in the home of a parent or relative, by requiring state efforts to make such home suitable for the proper care of the child; second, the section provides a unique but partial remedy in the form of "protective payments" for situations where the child's welfare is jeopardized; and third, the section points to the more drastic measure of removal from the home where the goals and safeguards of § 606(b) fail.

Under § 606(b) the term "aid to families with dependent children" means money payments, as well as medical or remedial care in behalf of a dependent child. By amendment in 1950, an adult relative caring for a dependent child also became eligible for these benefits. (§ 606(b)(1). *See* S. Rep. No. 165, 87th Cong. 1st Sess. (1961) U.S. Cong. & Adm. News V. 2. 1723). In 1962 "protective payments" were instituted (§ 606(b)(2)) to give the states more flexibility in dealing with the misuse of funds by an incompetent or incapable parent or relative. (S. Rep. No. 1589, 87th Cong. 2nd Sess. (1962) U.S. Cong. & Adm. News V. 1 1955). This new concept in public assistance allows payments to be made to other interested or concerned individuals to insure that the child rather than an irresponsible parent or relative receives the benefit of assistance, or otherwise provides direct vendor payments for food and other services where it is determined that the cash payments to the parent or relative would be detrimental to the welfare of the child. *Id;* S. Rep. No. 744, 90th Cong., 1st Sess. (1967) U.S. Cong. & Adm. News V. 2. 2837.

The new provision contains several limitations — it applies only to a state whose welfare plan provides for a determination by the state agency that payments in this form are necessary because the relative is so unable to manage funds that it would be contrary to the child's wel-

fare to make the payments to such relative (§ 606(b)(2)(A)); it requires special efforts to improve the ability of the relative to manage the funds (§ 606(b)(2)(B)); and it calls for periodic review to determine whether payments in this form are still necessary, with provision for judicial appointment of a guardian or legal representative if the need for payments to another interested individual continues beyond a specified period (§ 606(b)(2)(C)). Finally, and most significantly, the state plan must additionally provide for aid in the form of foster care (§ 606(b)(2)(D)) in behalf of a child described in § 608 — one who has been *removed* from the home of a relative and who is placed in a foster family home or child-care institution, following a court order that continuation in the home of the relative would be contrary to the welfare of such child. Again, § 606(b) leaves no doubt that the federal statute distinguishes between foster parents and related persons who care for a child.

As previously indicated, § 606(b) defines the term "aid to families with dependent children." Section 608(b) extends that definition by providing that the term "shall, notwithstanding section 606(b) . . . *include also* foster care in behalf of a child described in paragraph (a) of this section —(1) in the foster family home of any individual . . . or (2) in a child-care institution". Plaintiffs mistakenly emphasize the word "any" in the above-quoted section and erroneously conclude that "[n]o homes are excluded" (Plaintiffs' brief, p. 22) from assistance under § 608. It is plain, however, that by using the words "include also," Congress intended to extend the AFDC program from related care which was already covered under § 606 to child care in a foster home by an unrelated person. This section likewise manifests the intention of Congress that assistance is to be provided for foster care whether the care is administered in the home of an individual, or in a child-care institution. It is absurd, therefore, to conclude as plaintiffs do that Congress, by using the word "any" before "individual," intended to extend coverage to a group of persons (relatives caring for needy children) who were already covered by § 606. The only reasonable interpretation of § 608 is that it extends AFDC assistance to a group definitely not previously covered, i.e. unrelated persons caring for needy children. No other interpretation is logically possible.

Furthermore, the home of *any* individual providing foster care will not necessarily be entitled to public aid. Section 608(a)(4) clearly limits eligibility to those foster homes receiving a child removed from the home of a relative by court order who was already a recipient of AFDC in the home of a relative when the court issued its order, or who would have been eligible for aid if an application had been made on his behalf. Therefore, plaintiffs' assertion that "any" individual providing foster care is entitled to benefits, is literally inaccurate.

All of the sections of the AFDC provisions discussed above, and particularly § 606(b) when examined in reference to § 608, leave little doubt that both parental and related home care are regarded in the federal statute as the most desirable means of protecting the child, whereas "protective payments," foster home care, and institutional child-care are separate remedies, or necessary alternatives, when conditions in the child's own home prove unsuitable. This interpretation finds support in the literal language of the Social Security Act.

C.

The Legislative History Of The Social Security Act Illustrates The Congressional Intent To Create A Separate Foster Care Program Distinct From The Regular AFDC Program.

Since its inception, the Social Security Act has clearly distinguished federal aid aimed at keeping a child in the home of a parent or close relative from that granted to "homeless" children residing in foster homes. First, under Title IV, cash grants were made primarily to female heads of families who were widowed, divorced, or deserted, in order to keep young children with their mothers in their own homes. (S. Rep. No. 628, 74th Cong. 1st Sess. 17 (1935)) This was recognized as the least expensive and most desirable method for meeting the needs of these families yet devised. *Id.* Also under Title IV, cash payments were made to certain relatives of a needy child, since a "dependent child" was then, as now, defined as one living with a near relative in a residence maintained by such relative as his own home. *Id.* at 36. At the same time, Congress gave somewhat limited notice to another separate group of needy children, and provided for them in a completely distinct program under Title V:

> Another large group of children who stand in great need of protective measures are the homeless and neglected children. There are in this country approximately 300,000 dependent and neglected children, three-fifths of whom are cared for *in institutions,* and the remainder *in foster homes.* . . . [T]hese children "are in many respects the most unfortunate of all children, as their lives have already been impaired. To repair these damaged lives, as far as possible, and to keep these children from becoming a permanent burden to society, child-care services have been established in

> most urban centers, but in less populous areas they are exceedingly limited or nonexistent." . . . To stimulate the development of these badly needed child-care services, . . . a small amount of Federal aid (which does not have to be matched) is *authorized in title V.*

S. Rep. No. 628, 74th Cong. 1st Sess. 19 (1935) (emphasis added)

For over twenty-five years these two programs existed separately. In 1961, however, it was recognized that even though the objective of the federal welfare program is to provide cash assistance for needy children in their own homes, that is, in the home of a parent or close relative,

> there are some home environments that are clearly contrary to the best interests of these children. . . . Often, however, remedial action on behalf of the child was not possible. We believe that this undesirable situation could be avoided, in many instances, if assistance under this program were available for the care of the child in a foster family home when such care is necessary.

(S. Rep. No. 165, 87th Cong. 1st Sess. (1961) U.S. Cong. & Adm. News V. 2. 1721) The Senate Committee noted that while federal funds available through child welfare services to states under Title V were being used for foster care of children to a limited extent, a lack of financial resources had hindered the development of the most suitable care for children who had to be cared for outside their own home. *Id.* As a result, the new bill creating the AFDC-FC program allowed the states the option of bringing needy dependent children under the federally aided program, where a court of competent jurisdiction found that the children were not receiving proper care and protection in their own homes. The new provision gave the responsibility for the placement and care of such children to the state agency which was admin-

istering Title IV. *Id.* at 1722. It applied only to children "removed from their own homes, or the homes of close relatives, on or after May 1, 1961," to insure that federal participation would go to the "extension of foster family care." *Id.* Further, it applied only to children who had been eligible for assistance in their own homes, or the homes of one of the specified relatives. *Id.* at 1721-22. Payments were to be made on behalf of needy children "to the providers of foster care *according to State standards* as to the appropriate amount needed for such care." *Id.* at 1721. (emphasis added)

In explaining the new provision, the Senate Committee stated:

> The foster care provisions in your committee's bill have been designed, insofar as possible, to safeguard the rights of the child and his parents or relatives. No one takes lightly the severance, even for a brief period, of the ties between a child and parent, or somebody closely related to him. *At the same time,* an effort has been made to write into the law provisions which would stimulate and assist the States in the *protection and care of children.*

Id. at 1722. (emphasis added) It should be noted that plaintiffs have used a part of this statement in their brief completely out of context by ending the Committee's statement with the words "closely related to him." (Plaintiffs' brief, p. 32) The rest of the paragraph must be read along with the section quoted by plaintiffs or the meaning of the passage becomes distorted.[10] While Congress recognized

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10. Plaintiffs apparently ignored the sentence which reads: "At the same time, an effort has been made to write into the law provisions which would stimulate and assist the States in the protection and care of children," because

that the strengthening of family ties is indeed important, the statement quoted above also reflected that Congress' paramount purpose was to "assist the States in the protection and care of children." Further, the statement refers directly to certain precautions contained in § 608(f), to which the states would have to comply if they wished to take advantage of the new foster care program. Among these are provisions for periodic review of the necessity for the child's being in a foster family home or child-care institution; for assurance that the child is receiving proper care in the foster home; and for making possible services designed to improve the conditions in the home from which the child was removed, or to otherwise make possible his being placed in the home of a relative. While it is true that a policy exists that "children who cannot live with their parents should live with relatives," (Plaintiffs' brief, p. 32) it is also obvious from § 608(f) that once a child is returned to his parents or otherwise placed in the home of a relative, he is no longer considered to be receiving foster care.

The new provision for foster care became a permanent feature of the federal welfare law in 1962. At that time, the Senate Committee noted that a number of states had used the provision and that others intended to do so, since it had given the states an alternative to leaving children in unsuitable homes or caring for them elsewhere without federal participation in the cost. (S. Rep. No. 1589, 87th Cong. 2nd Sess. (1962) U.S. Cong. & Adm. News V. 1. 1954-55).

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this statement interferes with plaintiffs' contention that, "the Act *must* be administered to maintain and strengthen family ties . . ." which plaintiffs consider as the "underlying theme of the entire program of aid to dependent children." (Plaintiffs' brief, p. 32) (emphasis added)

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In 1967, Congress amended the foster care provision to provide more favorable federal matching, and to broaden eligibility for foster care for children removed from an unsuitable home by court order. (S. Rep. No. 744, 90th Cong. 1st Sess. (1967) U.S. Cong. & Adm. News V. 2. 2837-38). The concept of broadened eligibility does not, however, pertain to the inclusion of related persons in the foster care program. Rather, the broadened eligibility resulted from the removal by Congress of the restriction that in order for a state to receive any federal matching funds, the children must be recipients of AFDC when the court issues its order. The new basis for eligibility is now contained in § 608(a). The comments made by the Senate Committee at the time of removing the old restrictions are quoted at length because they produce the sound conclusion that then, as before, Congress intended a distinction between foster care and related care:

> There is some evidence that courts may be reluctant to place a child in foster care because Federal funds are not available (and the cost of the care must come out of local funds in many areas) unless the child is in the home of a specified relative. The proposed change would make the cost of caring for children in foster care subject to Federal sharing if the child has been placed in foster care by a court order (if the child is removed from the home of a relative as a result of a judicial determination that continuation in such home would be contrary to his welfare) and if the child would have been eligible for aid under the AFDC program if an application had been made on his behalf. Also included are children placed under court order who had been living with one of the specified relatives enumerated in the law within 6 months and would have been eligible upon application for AFDC if he were living with such relative and were removed from the home of such relative by order of the court. This latter group

> would include some children already in foster care at the time of this legislation and who, except for this provision, would not be eligible because they had already been removed from their homes. Temporary plans may be needed, for example, for children both of whose parents are killed in an accident and for whom the court does not take immediate jurisdiction. The child *need not live with a relative* and may be in a *foster family home or in a voluntary institution* at the time the court makes its decision. S. Rep. No. 744, 90th Cong. 1st Sess. (1967) U.S. Cong. & Adm. News V. 2. 3001. (emphasis added)

The foregoing forcefully demonstrates that the legislative history and plain meaning of the Social Security Act indicate that Congress intended a distinction between foster care and related care. It is respectfully submitted that since the Illinois scheme simply parallels the federal one, it cannot be intelligently argued that Illinois' treatment of relatives caring for needy children is incompatible with the Social Security Act.

D.

The Plaintiffs, Who Are Related To The Needy Children For Whom They Care, Are Simply Not Foster Parents Within The Ambit Of The AFDC-FC Program Provided For In § 608.

From both the language of the federal statute pertaining to AFDC and its legislative history, it is clear that the term "related foster parent" is a misnomer for federal welfare purposes. Plaintiffs insist that they must be included within the definition of "foster parent" because they have not been specifically excluded by the federal statute —"Unless the Defendants can show where the plain words or legislative history of the Social Security Act *specifically authorizes the denial* of AFDC-FC payments . . . the scheme must fail." (Plaintiffs' brief, p. 24; also p. 15-

16) (emphasis added). This method of statutory construction has been emphatically rejected by the Supreme Court:

> Several of the courts that have faced this issue have read King, Townsend, and Carleson, supra, to establish a special rule of construction applicable to Social Security Act provisions governing AFDC eligibility. They have held that persons who are arguably included in the federal eligibility standard must be deemed eligible unless the Act or its legislative history clearly exhibits an intent to exclude them from coverage, in effect creating a presumption of coverage when the statute is ambiguous (Citation omitted). This departure from ordinary principles of statutory interpretation is not supported by the Court's prior decisions. King, Townsend, and Carleson establish only that once the federal standard of eligibility is defined, a participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional. The method of analysis used to define the federal standard of eligibility is no different from that used in solving any other problem of statutory construction.

Burns v. *Alcala,* ——U.S.——, 43 L. Ed. 2d 469, 475 (1975). The Court in *Burns* instead supported the principle that "words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary." *Id.* at 475; *Banks* v. *Chicago Grain Trimmers Assn., Inc.,* 390 U.S. 459, 465, 20 L. Ed. 2d 30, 36 (1968). It has also been said that "[t]echnical words which have a definite and well-understood meaning will be presumed to have been used in that sense in the absence of surrounding circumstances or context which show that a different meaning was intended." *In Re Norman's Estate,* 209 Minn. 19, 26, 295 N.W. 63, 66 (1940). In that case, the Minnesota Supreme Court found that the word "foster" has a "significance

which cannot be overlooked." 209 Minn. at 25; 295 N.W. at 66. In deciding whether a child was "adopted" for purposes of inheritance, the court turned to several well-accepted authorities:

> In Webster's New International Dictionary, 2d Ed., 1935, "foster" is thus defined: "Affording, receiving, or sharing nourishment, nurture, or sustenance, *though not related by blood* or, • • • by ties of nature, • • • or the like. . . .
>
> And see definition in Funk & Wagnall's Standard Dictionary: "Foster, to provide with food; nourish; rear; aid; encourage; fosterage — the care of a foster sister, foster brother . . . one considered as holding the relationship indicated *in consequence of nursing and rearing, though not related by blood.*" 209 Minn. at 25-26; 295 N.W. at 66.

Acceptance of this definition by the United States Supreme Court is implicit in *Burns* v. *Alcala,* ——U.S.——, 43 L. Ed. 2d 469 (1975), which concerned the eligibility of an unborn child to receive AFDC benefits. In denying payments to this group of recipients, the Court stated:

> The restricted purpose of the AFDC program is evidenced in the Act itself by the limitations on aid. The Act originally authorized aid only for children living with designated relatives. The list of relatives has grown . . . but there is still no general provision for AFDC payments to needy children living with distant relatives or unrelated persons, or in institutions. ——U.S.——, 43 L. Ed. 469, 476 (1975).

The Court then added in a footnote:

> The Act now authorizes, in addition to payments for children in the homes of designated relatives, foster care payments for children who have been removed from the homes of relatives. 42 USC § 608. *Id.* at 476 n. 9.

Both the Illinois statute and the Social Security Act, upon which the Illinois statute is based, classify only two groups of aid recipients — one composed of parents and relatives, and the other consisting of child-care institutions and strangers who provide foster care. These categories are compatible with the commonly accepted meaning of the term "foster child." Thus, plaintiffs are in error in stating that "Illinois should make foster care payments to its wards living with related foster parents, as the federal law requires." (Plaintiffs' brief, p. 12).

The fact that "[t]wo of the three federal district courts that considered the question . . . found the state schemes violated the Social Security Act and the Supremacy Clause" is inconclusive. (Plaintiffs' brief, p. 37) Plaintiffs place particular reliance on *Clampett* v. *Madigan,* No. Civ. 73-4018 D. S. Dak. (S. Div. 5-24-73) where the District Court of South Dakota found a conflict between the stated purpose of the Social Security Act and the South Dakota foster care regulations which, like those of Illinois, made foster care payments only to strangers caring for needy children. The court's determination was based in good part on the purpose of AFDC as stated in § 601 of the AFDC provisions — to help maintain and strengthen family life. While there is no denial by the defendants that the regular AFDC program is designed specifically to promote this purpose, it is totally unrealistic to attach a similar purpose to the separate AFDC-FC provisions (42 U.S.C. § 608) which, as previously discussed, were intended to solve the serious problems emerging from the inability to strengthen family life. In contrast to this finding by the single-judge court in *Clampett,* the three-judge court below agreed that the purpose of § 608 was to expand coverage to include unrelated foster care. The weight to be accorded to the decision of the latter three-judge court is unquestionably superior. (*See Moody* v. *Flowers,* 387 U.S. 97, 101, 18 L. Ed. 2d 643, 647 (1967).

Similarly, the recent Program Instruction issued by the Department of Health, Education and Welfare (APA-PI-75-9, Oct. 25, 1974) is misleading. As plaintiffs indicate in their brief, HEW adopts the position that "the Illinois policy of denying foster care AFDC benefits for children living with relatives is invalid because it conflicts with specific criteria for eligibility set forth in the Social Security Act; . . ." (Plaintiffs' brief, p. 26) While the Court regularly resorts for guidance to the rulings interpretations and opinions of the agency responsible for the administration of the Social Security Act, the Court on numerous occasions has refused to accept HEW regulations where they were inconsistent with the federal statute. *Burns* v. *Alcala,* ——U.S.——, 43 L. Ed. 2d 469 (1975); *Townsend* v. *Swank,* 404 U.S. 282, 30 L. Ed. 2d 448 (1971); *King* v. *Smith,* 392 U.S. 309, 20 L. Ed. 2d 1118 (1968). In *Burns* v. *Alcala,* the Supreme Court refused to acquiesce in HEW's long-standing administrative practice of allowing states to include unborn children as eligible for aid.

It should also be noted that the official regulations promulgated by HEW are contained in C.F.R., and not in informal Program Instructions issued to state agencies which administer state welfare plans. It is clear that this unofficial statement by HEW is not only inconsistent with the Social Security Act, but it appears to be in direct contradiction with its previous policy[11] that parents and related persons are eligible for benefits under AFDC, while any other indi-

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11. *See,* letter from acting regional commissioner of HEW dated March 10, 1971, Supp. pp. A26-28.

vidual and voluntary institutions are eligible under AFDC-FC. While the HEW regulations do not expressly make this distinction, the mutual exclusion of each category is inherent throughout the regulations. (See 45 C.F.R. 233.90(c)(1)(v)(B) (1 and 2); 45 C.F.R. 233.90(c)(2)(i); 45 C.F.R. 233.110(a)(2)(ii) and (iii)). For example, the AFDC program is covered by § 233.90, which provides that dependent children living with certain relatives are entitled to federal aid. It is noteworthy that within that same section the home of such relative is considered eligible under AFDC, even though the child is under the jurisdiction of the court or under the custody of a state agency while living in the home of the relative. (§ 233.90(c)(1)(v)(B) 1 and 2.) This regulation has direct application to the instant case, where the children cared for by plaintiffs are under the court's supervision and under the custody of the Illinois Department of Children and Family Services. The AFDC-FC program is separately regulated under § 233.110, and provides that aid will be given in the form of foster care to an eligible child who was removed from the home of a relative specified in the above AFDC regulation. The repeated use of the terms "foster family home" and "child care institution" as one unit throughout § 233.110 leaves the unmistakable impression that HEW has in the past treated these entities separately from regular AFDC recipients, which includes the relatives of dependent children.

From the above, it is evident that plaintiffs, who are related to the needy children for whom they care, are simply not foster parents and are not entitled to foster care benefits under AFDC-FC (42 U.S.C. § 608).

It is respectfully submitted that for the foregoing reasons the Illinois statutory foster care scheme is consistent with the purpose and meaning of the Social Security Act and cannot, therefore, violate the Supremacy Clause of the United States Constitution.

II.

THE ILLINOIS STATUTORY FOSTER CARE SCHEME COMPLIES WITH THE REQUIREMENTS OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Introduction

The Fourteenth Amendment of the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws". In its most basic sense the prohibition contained in this Amendment goes no further than invidious discrimination. *Morey* v. *Doud*, 354 U.S. 457, 463, 1 L. Ed. 2d 1485, 1490 (1957) citing *Williamson* v. *Lee Optical*, 348 U.S. 483, 489, 99 L. Ed. 563, 573 (1955). Plaintiffs argue that the Illinois welfare scheme which results in greater monetary assistance benefits to children living in unrelated homes than to children living in the homes of relatives constitutes an invidious discrimination against the latter class of children. It is respectfully submitted that the Illinois welfare scheme which results in the aforementioned allocation of welfare funds does not constitute invidious discrimination, but rather bears a rational relationship to legitimate legislatively articulated state purposes, and, therefore, complies with the mandate of the equal protection clause.[12]

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12. *Cf. Weinberger* v. *Wiesenfeld*, —— U.S. ——, 43 L. Ed. 2d 514, 525 N. 16 (1975); *Jimenez* v. *Weinberger*, 417 U.S. 628, 41 L. Ed. 2d 363 (1974).

A. The Three-Judge District Court Properly Employed The Traditional "Minimum Scrutiny, Rational Relationship" Standard Of Equal Protection Review.

This Court in *Morey* v. *Doud,* 354 U.S. 457, 1 L. Ed. 2d 1485 (1957) in a case involving the validity of the Illinois Community Currency Exchanges Act summarized the rules for testing a discrimination under the Fourteenth Amendment Equal Protection Clause as follows:

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." (354 U.S. at 463-64, 1 L. Ed. 2d at 1490).

Likewise, these fundamental rules expressed in *Morey* v. *Doud, supra,* have application in the area of economics and social welfare legislation. A state does not violate the equal protection clause simply because the classifications made by its welfare laws are imperfect. *Dandridge* v. *Williams,* 397 U.S. 471, 485, 25 L. Ed. 2d 491, 501 (1970)

> To be sure, the cases cited, and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard. (Citation omitted) It is a standard that has consistently been applied to state legislation restricting the availability of employment opportunities. (Citation omitted) And it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy. *Dandridge* v. *Williams,* 397 U.S. at 485-86, 25 L. Ed. 2d at 502.

In *Jefferson* v. *Hackney,* 406 U.S. 535, 32 L. Ed. 2d 285 (1972) this Court continued this approach to equal protection challenges to social welfare legislation saying "[s]o long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and needy are not subject to a constitutional straitjacket" (406 U.S. at 546, 32 L. Ed. 2d at 296), and ultimately held that "Texas' decision to provide somewhat lower welfare benefits for AFDC recipients is [not] invidious or irrational" (406 U.S. at 549, 32 L. Ed. 2d at 297).

In reviewing the instant case, the three-judge district court employed the standard of review referred to as follows:

> We turn now to the equal protection question. A state statute dealing with social welfare need only be rationally based and free from invidious discrimination. Dandridge v. Williams, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970). Since the statutes challenged here fall within the category governed by the *Dandridge* rule, *their validity depends upon whether the distinction between related and unrelated foster parents is based on differences that are reasonably*

related to the legitimate purposes of the foster care program. (*Youakim* v. *Miller*, 374 F. Supp. 1204, 1207-08 (1974)) (emphasis added)

It is respectfully submitted that the three-judge district court employed the proper equal protection test, and that its application to the cause at hand must necessarily result in a finding that the distinction between related and unrelated foster parents is based on differences that are reasonably related to the legitimate purposes of the foster care program.

1. The Illinois Welfare Scheme Is Based Upon Legitimate Legislatively Articulated State Purposes, And The Allocation Of Available Welfare Funds Bears A Rational Relationship To The Legitimate State Purposes Upon Which The Program Is Grounded.

The Illinois welfare scheme which affords greater monetary assistance benefits to unrelated families providing foster care than to relatives caring for dependent children is grounded upon several recognized legitimate state purposes, and the allocation of available welfare funds has a rational relationship to the advancement of those purposes.

The primary purpose of the Illinois Department of Children and Family Services is to provide "social services to children and their families". Ill. Rev. Stat. 1971, ch. 23, § 5001. In providing these services the Department is duty bound to (1) prevent, remedy, or assist in the solution of problems which may result in the neglect, abuse, or exploitation of children; (2) protect and care for homeless, dependent or neglected children; (3) protect and promote the welfare of children, including the strengthening of their own families and counseling of family members; (4) provide adequate care of children away from their homes, where needed, in foster family homes or day care or other

child care facilities; and (5) provide counseling for mentally retarded, physically and socially handicapped children and their parents. Ill. Rev. Stat. 1971, ch. 23, § 5005. It is clear beyond question, therefore, that the avowed purpose of the Illinois legislation creating the Department of Children and Family Services is the protection and care of *all* of the state's neglected and homeless children, and that purpose is superimposed upon all other considerations. Moreover, this purpose has been recognized as a legitimate state concern, *Ramos* v. *Montgomery*, 313 F. Supp. 1179, 1181 (S.D. Cal. 1970) aff'd 400 U.S. 1003, 27 L. Ed. 2d 618 (1971) and one which is the paramount goal of the AFDC program. *King* v. *Smith*, 392 U.S. 309, 325, 20 L. Ed. 2d 1118, 1130 (1968).[13]

The three-judge district court, properly perceiving that the purpose of caring for neglected and homeless children must permeate state policy, correctly observed that the Illinois General Assembly "could reasonably have been concerned about how to use available public funds to provide as many foster homes as possible."[14] *Youakim* v. *Miller*,

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13. It should be noted that in *Ramos* v. *Montgomery*, while the district court recognized that "[t]he family structure has been and remains the cornerstone of our society [;] [m]ore important even is the overall interest of the public in the protection of the child," (313 F. Supp. at 1181) and this Court in *King* v. *Smith*, observed that "protection of such children is the paramount goal of AFDC." (392 U.S. at 325, 20 L. Ed. 2d at 1130).

14. Plaintiffs' characterization of this state interest as speculative at page 44 of their brief is simply without merit. The purpose of providing as many suitable foster homes as possible is completely consistent with the overall purpose of promoting the welfare of all the needy children

374 F. Supp. at 1208. Since such a state of facts are reasonable, given the limited amount of funds available for the program, the three-judge district court quite correctly ruled that they existed at the time the Illinois law was enacted. *Morey* v. *Doud,* (354 U.S. at 464, 1 L. Ed. 2d at 1490).

This Court in *Dandridge* v. *Williams* held that,

> Given Maryland's finite resources, its choice is either to support some families adequately and others less adequately, or not to give sufficient support to any family. . . .
>
> *The strong policy of the statute in favor of preserving family units does not prevent a State from sustaining as many families as it can,* . . . (397 U.S. at 479-80, 25 L. Ed. 2d at 499). (Emphasis added)

This statement in *Dandridge* is a clear recognition that a state may validly allocate welfare resources to provide as many homes as possible for homeless and neglected children even though such a plan may provide more limited resources to some children than others.

In this case, logic and established precedent require the conclusion that more homes will be provided for neglected children through the present allocation of Illinois welfare resources. The more resources made available for unrelated foster care, the greater the likelihood of obtaining foster parents who would otherwise have no particular

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of the state. (*See* Ill. Rev. Stat. 1971, ch. 23, § 5005). Likewise the plaintiffs' statement that "the District Court inferred that the state's interest in strengthening the family unit is of lesser importance than the care of children generally" at page 45 of their brief is unfair. The court in actuality balanced the two interests and found that the state may have reasonably concluded that the greater good for the greater number of children in need of foster homes is served by the classification made. *Youakim* v. *Miller,* (374 F. Supp. at 1208)

reason for caring for unrelated neglected children. The problems attendant to caring for an unknown foster child are varied and serious.

> Foster children indeed are "children at risk." (9:226) Katz studied the dynamics of children placed in foster homes and found guilt, anger and depression to be prominent. (5:295-299) The anger tended to generate anxiety, which led to provocative testing behavior. Some children were unable to respond to the affection of the foster parents, in order to avoid suffering another separation. According to Maluccio, children in foster care experienced identity crises and feelings of loss and helplessness and their negative behavior seemed to put the foster family under stress unless the family was sensitive to the feelings and needs of the child. (6:69-74) (Child Welfare, Vol. LII, Number 2, Feb., 1973, p. 84).[15]

The very real dangers involved in becoming a foster parent reasonably warrant the conclusion that a monetary incentive will increase the likelihood that individuals not related by family bonds will assume these burdens in caring for unknown neglected children.

It is argued by plaintiffs, however, that all of the burden attaching to unrelated foster care, likewise occurs when care is rendered in the home of a relative, and therefore, resources ought to be allocated on the same basis. This position is not entirely reasonable. A relative is certainly more likely to know a child for whom he or she is caring, and therefore, is less likely to encounter the personality

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15. The article (A Foster Home For Crisis Placements) from which this quotation was taken was written by John F. Simonds, M.D. a child psychiatrist. Xerox copies of the complete article were mailed to the Court on August 12, 1975.

problems described in Dr. Simonds' article, or be better able to handle the problems encountered because of a familiarity with the child.[16] Moreover, while it is true as plaintiffs point out that children cared for by relatives have basically the same medical, nutritional and clothing requirements as children cared for by unrelated foster parents, it is not true that unrelated foster parents, absent a monetary incentive, will be as willing to provide care for the unrelated children living with them as would a relative, who does so out of a sense of familial obligation. This fact is borne out in plaintiffs' own complaint. Plaintiffs allege in paragraph 25 of their Second Amended Complaint (App. 10-11) that "[p]laintiff related foster parents are informed and believe that they are providing their foster son Timothy with foster care of a quality equal to or better than the care he has received and would receive from foster parents unrelated to him". Plaintiffs then recite in paragraphs 25 (a) (b) and (c) that the basis for their "belief" is that they have expended their own funds to correct Timothy's breathing difficulty. Similar allegations are made with regard to Mary Lou—the second related child living with the Youakims. (*See* App. 11, Paras. 26, 26 (a), (b), (c)). These unselfish acts are certainly praiseworthy and commendable. Similarly, they bear out the sense of family spirit perceived by the state on behalf of relatives caring for related children which has permitted the State of Illinois to make more money available to secure qualified un-

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16. Plaintiffs' complaint supports the state's contention that unknown foster children are more likely to present problems than are related children. In paragraphs 23 and 24, plaintiffs allege that Mary Lou, the related child who lives with them, was considered to have a "behavior" problem when living with foster parents, but is well-adjusted since living in the home of relatives. (App. 10)

related foster parents. This in turn makes it more likely that a sufficient number of homes will be available and supports the three-judge court's conclusion that, "[t]his classification, the wisdom of which is not for us to determine, bears a rational relationship to the legitimate purpose of attempting to assure that foster homes are made available."[17] *Youakim* v. *Miller*, 374 F. Supp. at 1208.

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17. The three-judge district court's opinion in *Ramos* v. *Montgomery*, [illegible] F. Supp. 1179 (S.D. Cal. 1970) aff'd. 400 U.S. 1003, 27 L. Ed. 2d 618 (1971) certainly supports the proposition that a reduction in foster care assistance for the purpose of providing increased assistance to relatives would result in a threat to the entire foster care program. Although that case involved the claim of natural parents rather than relatives, its rationale is equally applicable here. There the court said,

> Foster parents perform many intangible services for their foster children. Natural parents have a moral, if not a legal obligation to perform those services. The labors of cooking, washing, ironing clothes, cleaning house, etc., not to mention the time and patience needed to aid in the development of the child's character are all necessary aspects of his support. To provide these services foster parents must give up much of their privacy in daily affairs.
>
> Some children must of necessity be placed in foster homes due to the financial inability of the parents to provide a suitable home. If such parents were to receive the same aid per child as foster parents receive there is no doubt that they could do a better job in supporting their children. Nevertheless, to give them that additional aid from appropriated funds would result in an overall reduction in money available for foster home care. A reduction in foster home care aid would threaten the continued existence of the entire program and jeopardize the welfare of thousands of children. (313 F. Supp. at 1183).

The three-judge district court properly observed that there was an additional rational basis for the classification in question.

> A consideration of the consequences of eliminating the classification which plaintiffs challenge will identify another rational basis for it. The payments which are the subject of this litigation are intended to subsidize care for children who have been adjudicated wards of the state. It is manifest that there are many children in Illinois whose natural parents are deceased but who, without being adjudicated wards of the state, are cared for by relatives who are their legal custodians, guardians, or perhaps even adoptive parents. Certainly the state has an interest in encouraging its citizens to care for related minors who have been orphaned by the death of their parents, either by adopting them, accepting the responsibilities of guardianship, or even merely taking informal custody of such minor children without having them adjudicated wards of the state. If the plaintiffs' attack on the Illinois program were sustained, relatives would have a financial inducement to cause orphaned children to be adjudicated wards of the state in order to qualify themselves for foster care payments. The state may rationally conclude that such a financial motivation would contravene the policy of the laws relating to adoption and guardianship. (*Youakim* v. *Miller*, 374 F. Supp. at 1209-10 n. 5).

Furthermore, subjecting a child to a court proceeding which labels the child a ward of the state where such a procedure is apparently unnecessary can never be in the best interest of the child, and certainly the result of such a proceeding leaves an emotional scar upon the individual involved.[18]

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18. The plaintiffs are apparently in complete agreement with this position since on page 40 of their brief it is said that, "[a] certain opprobrium inevitably attaches to the children as a result of this process." Notwithstanding the "opprobrium" plaintiffs apparently would approve a program which would encourage relatives to subject the children for whom they care to such a process.

Yet the end product of an acceptance of the plaintiffs' position will provide a monetary incentive to every person who cares for a child related to him to have that child adjudicated a ward of the state. Such a probability certainly contravenes the state's interest in encouraging its citizens to care for related minors without having them adjudicated wards of the state, and runs contrary to the welfare of the children involved.

It should also be observed at this point that an acceptance of plaintiffs' position may result in a denial of equal protection to relatives caring for related children without an intervening court adjudication. If plaintiffs are successful in this case, they, as relatives caring for related children, will be entitled to the higher AFDC-FC assistance benefits, while relatives who care for related children who have not been adjudicated wards of the state and who are entitled to welfare assistance will only be eligible for the lower AFDC assistance benefits. This is true, of course because the Illinois program, which parallels §608 of the Social Security Act requires a court adjudication for AFDC-FC eligibility. It is submitted that a court adjudication declaring a child a ward of the state is not a proper reason for discriminating between two otherwise like classes of relatives caring for children related to them. This, however, is the anomalous result produced by an acceptance of plaintiffs' contentions.

It is, therefore, again respectfully submitted that the three-judge district court correctly applied the traditional

"minimum scrutiny" test and properly found that the classification contained in the Illinois welfare scheme is based upon differences that are reasonably related to the legitimate purpose of the foster care program.

B. This Case Does Not Require The Application Of A More Stringent Standard Of Equal Protection Review.

While it is true, as plaintiffs suggest, that this Court has examined more closely classifications involving inherently suspect groups or protected fundamental rights, *Loving* v. *Virginia,* 388 U.S. 1, 18 L. Ed. 2d 1010 (1967); *Sugarman* v. *Dougall,* 413 U.S. 634, 37 L. Ed. 2d 853 (1973); *Shapiro* v. *Thompson,* 394 U.S. 618, 22 L. Ed. 2d 600 (1969) this case plainly does not require the application of such a standard of review.

1. Plaintiffs Are Not Members Of An Inherently Suspect Class.

This Court observed in *Frontiero* v. *Richardson,* 411 U.S. 677, 36 L. Ed. 2d 583 (1973) that "classifications based upon . . . race, alienage, and national origin are inherently suspect and must therefore be subjected to close judicial scrutiny." (411 U.S. at 682, 36 L. Ed. 2d at 589) and concluded that the same considerations apply to classifications based upon sex. (411 U.S. at 688, 36 L. Ed. 2d at 592). This case obviously does not involve any of the previously mentioned inherently suspect groups and for that reason alone plaintiffs' argument that close scrutiny be given this classification should be rejected.

The plaintiffs next argue at page 41 of their brief that "[t]he Court has given close scrutiny to statutes which discriminate against illegitimate children" even though

illegitimates are not an inherently suspect group. Several cases[19] are then cited in support of an unuttered analogy between illegitimates and the needy children involved in this case. While the cases cited support the proposition that this Court will afford illegitimates considerable protection, the holdings have no application here. First, the unjust social opprobrium which attaches to an illegitimate child cannot honestly be compared with the problems of the needy children involved in this case. Illegitimates have for centuries been subjected to injustice, ridicule, and scorn. No such similar historical fate has befallen the class of children involved in this case. Next, the cases cited by plaintiffs involved a denial of benefits to a class of children because of their status as illegitimates. In the present case, as indicated in Argument I of this brief, plaintiffs are not denied assistance commensurate with the state-established standard of need,[20] they simply are not given the premium Illinois pays to attract foster parents.

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19. *Levy* v. *Louisiana,* 391 U.S. 68, 20 L. Ed. 2d 436 (1968); *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 31 L. Ed. 2d 768 (1972); *Griffin* v. *Richardson,* 346 F. Supp. 1226 (D. Md. 1972) aff'd. 409 U.S. 1069, 34 L. Ed. 2d 660 (1972); *Davis* v. *Richardson,* 342 F. Supp. 588 (D. Conn. 1972) aff'd. 409 U.S. 1069, 34 L. Ed. 2d 659 (1972); *Gomez* v. *Perez,* 409 U.S. 535, 35 L. Ed. 2d 56 (1973); *New Jersey Welfare Rights Organization* v. *Cahill,* 411 U.S. 619, 36 L. Ed. 2d 543 (1973); *Jimenez* v. *Weinberger,* 417 U.S. 628, 41 L. Ed. 2d 363 (1974).

20. The plaintiffs rely, in great part, on *Williams* v. *Wohlgemuth,* 366 F. Supp. 541 (W.D. Pa. 1973) to support their equal protection argument. This case has no direct application to the instant one for the following reasons. In *Williams,* the Pennsylvania scheme involved two basic classifications of persons eligible for assistance: (1) children

It is, therefore, respectfully submitted that the classification made by the Illinois welfare scheme does not involve an inherently suspect group nor does it lend itself to comparison with classifications of illegitimate children.

2. The Illinois Welfare Scheme Does Not Violate A Fundamental Right.

The plaintiffs admit at pages 42 and 43 of their brief that there is no recognized "fundamental interest" involved in this case, but assert that the right of family association is so basic as to require treatment similar to those instances where fundamental interests are involved.

At the outset it should be pointed out that the right of family association is not the precise right plaintiffs have

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living with relatives and (2) children living with non-relatives. The second class, children living with non-relatives was further sub-divided into two classes: (1) children living with non-relatives who were, themselves, receiving public assistance, and (2) children living with non-relatives who were not, themselves, receiving public assistance. The second sub-class, children living with non-relatives, who were not, themselves, receiving public assistance was flatly denied eligibility because the person with whom they lived was not eligible to receive assistance regardless of the child's need. (366 F. Supp. at 545). It was this flat denial of eligibility based upon the custodian's ineligibility which resulted in a denial of equal protection rather than the relationship of the child to the custodian. As previously indicated, all needy children are eligible for assistance without regard to the custodian's eligibility under the Illinois scheme.

It is also interesting to note that the classification found "invidious" in *Williams* favored relatives and discriminated against a sub-class of non-relatives; just the opposite of the situation involved here.

attempted to assert. Rather they have attempted to enforce an alleged right to welfare funds above the Illinois established standard of need. As previously indicated, there is no fundamental right to welfare funds above such an established standard, nor do cases involving claims to welfare funds require stricter judicial scrutiny. *Dandridge* v. *Williams*, 397 U.S. 471, 25 L. Ed. 2d 491 (1970); *Jefferson* v. *Hackney*, 406 U.S. 535, 32 L. Ed. 2d 285 (1972).

In support of their position plaintiffs cite *Levy* v. *Louisiana*, 391 U.S. 68, 20 L. Ed. 2d 436 (1968) and *Stanley* v. *Illinois*, 405 U.S. 645, 31 L. Ed. 2d 551 (1972) and conclude at pages 42-43 of their brief that "[i]n *Levy* and *Stanley* the Court recognized and deferred to the warm, deep and enduring relationship between parent and child. In *Youakim* the relationship between brother and sister is similarly warm, deep and enduring..." It is ironic that plaintiffs would analogize the relationship between parent and child to relative and child, here, to establish the violation of an alleged fundamental right, but deny the existence of the same relationship when tendered by the state to show that relatives, like natural parents, will care for related children because of "warm, deep and enduring" feelings. In *Ramos*, it was these same feelings which justified a disparity in welfare payments between natural parents and unrelated foster parents. If this same relationship which exists between parent and child is shared by a relative and child as plaintiffs suggest, and the state agrees, then *Ramos* has direct application to the instant case, and no fundamental interest of plaintiffs has been denied.[21]

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21. The court in *Ramos* recognized that if natural parents were to receive the same amount of aid as foster parents, it would be more likely that they could keep the family together. However, the Court approved the welfare scheme despite the existence of this fact.

It should also be observed at this point that the administrative scheme employed by Illinois endeavors to alleviate any incidental strain which may be placed upon the family relationship as a result of the present allocation of welfare funds. As noted by the three-judge district court in *Youakim,* "[i]n addition to the AFDC payments, some foster families in which the parents and children are related receive additional funds from the Social Service Administration up to the amount of foster care payments, if the Department of Children and Family Services makes a determination of need." (374 F. Supp. at 1206). This exception to the general practice, the opinion goes on to point out, is referred to in the CFS placement manual, (App. 36-37) and at the time this suit was commenced approximately 140 of the 1500 related foster families in Illinois received this extra allowance. (374 F. Supp. at 1206). In fact, the plaintiffs in this case were found eligible for additional assistance pursuant to the exception policy enunciated by the three-judge court on September 1, 1974. (See the xeroxed materials mailed to the Court on August 12, 1975.)

It is once again respectfully submitted that the Illinois welfare scheme does not violate a fundamental interest of plaintiffs, and further that it includes an administrative procedure designed to alleviate any incidental strain placed upon family ties by its operation.

CONCLUSION

For the foregoing reasons Defendants-Appellees respectfully urge this Court to affirm the judgment of the three-judge district court, which granted Defendants-Appellees' motion for summary judgment.

Respectfully submitted,

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APPENDIX

SUPPLEMENT

42 U.S.C. § 601:

§ 601. Authorization of appropriations

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

Aug. 14, 1935, c. 531, Title IV, § 401, 49 Stat. 627; 1946 Reorg. Plan No. 2, § 4, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; 1953 Reorg. Plan No. 1, §§ 5, 8, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631; Aug. 1, 1956, c. 836, Title III, § 312(a), 70 Stat. 848; July 25, 1962, Pub. L. 87-543, Title I, § 104(a)(4), (c)(2), 76 Stat. 185, 186; Jan. 2, 1968, Pub. L. 90-248, Title II, § 241(b)(1), 81 Stat. 916.

42 U.S.C. § 602(a) provides in pertinent part:

§ 602. State plans for aid and services to needy families with children; contents; approval by Secretary

(a) A State plan for aid and services to needy families with children must

• • •

(7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income;

• • •

(10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals;

• • •

(19) provide—

(A) that every individual, as a condition of eligibility for aid under this part, shall register for manpower services, training, and employment as provided by regulations of the Secretary of Labor, unless such individual is—

(i) a child who is under age 16 or attending school full time;

(ii) a person who is ill, incapacitated, or of advanced age;

(iii) a person so remote from a work incentive project that his effective participation is precluded;

(iv) a person whose presence in the home is required because of illness or incapacity of another member of the household;

(v) a mother or other relative of a child under the age of six who is caring for the child; or

(vi) the mother or other female caretaker of a child, if the father or another adult male relative is in the home and not excluded by clause (i), (ii), (iii), or (iv) of this subparagraph (unless he has failed to register as required by this subparagraph, or has been found by the Secretary of Labor under section 633(g) of this title to have refused without good cause to participate under a work incentive program or accept employment as described in subparagraph (F) of this paragraph);

and that any individual referred to in clause (v) shall be advised of her option to register, if she so desires, pursuant to this paragraph, and shall be informed of the child care services (if any) which will be available to her in the event she should decide so to register;

42 U.S.C. § 603(a)(1)(B):

§ 603. Payment to States; computation of amounts; Federal share of assistance payments; social and supportive services; appropriation; family planning services and supplies; reduction of amounts

(a) From the sums appropriated therefor, the Secretary of the Treasury shall (subject to section 1320b of this title) pay to each State which has an approved plan for aid and services to needy families with children, for each quarter, beginning with the quarter commencing October 1, 1958—

(1) in the case of any State other than Puerto Rico, the Virgin Islands, and Guam, an amount equal

to the sum of the following proportions of the total amounts expended during such quarter as aid to families with dependent children under the State plan (including expenditures for premiums under part B of subchapter XVIII of this chapter for individuals who are recipients of money payments under such plan and other insurance premiums for medical or any other type of remedial care or the cost thereof)—

• • •

(B) the Federal percentage of the amount by which such expenditures exceed the maximum which may be counted under clause (A), not counting so much of any expenditure with respect to any month as exceeds (i) the product of $32 multiplied by the total number of recipients of aid to families with dependent children (other than such aid in the form of foster care) for such month, plus (ii) the product of $100 multiplied by the total number of recipients of aid to families with dependent children in the form of foster care for such month:

42 U.S.C. § 605:

§ 605. Use of payments for benefit of children

Whenever the State agency has reason to believe that any payments of aid to families with dependent children made with respect to a child are not being or may not be used in the best interests of the child, the State agency may provide for such counseling and guidance services with respect to the use of such payments and the management of other funds by the relative receiving such payments as it deems advisable in order to assure use of such payments in the best interests of such child, and may provide for advising such relative that continued failure to so use such payments will result in substitution therefor of protective payments as provided under section 606(b)(2) of this

title, or in seeking appointment of a guardian or legal representative as provided in section 1311 of this title, or in the imposition of criminal or civil penalties authorized under State law if it is determined by a court of competent jurisdiction that such relative is not using or has not used for the benefit of the child any such payments made for that purpose; and the provision of such services or advice by the State agency (or the taking of the action specified in such advice) shall not serve as a basis for withholding funds from such State under section 604 of this title and shall not prevent such payments with respect to such child from being considered aid to families with dependent children.

Aug. 14, 1935, c. 531, Title IV, § 405, 49 Stat. 629; July 25, 1962, Pub. L. 87-543, Title I, § 107(a), 76 Stat. 188.

42 U.S.C. § 606:

§ 606. Definitions

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

(b) The term "aid to families with dependent children" means money payments with respect to, or (if provided in or after the third month before the month in which the recipient makes application for aid) medical care in behalf of or any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care recognized under State law to meet the needs of the relative with whom any dependent child is living (and the spouse of such relative if living with him and if such relative is the child's parent and the child is a dependent child by reason of the physical or mental incapacity of a parent or is a dependent child under section 607 of this title), and (2) payments with respect to any dependent child (including payments to meet the needs of the relative, and the relative's spouse, with whom such child is living, and the needs of any other individual living in the same home if such needs are taken into account in making the determination under section 602(a)(7) of this title) which do not meet the preceding requirements of this subsection, but which would meet such requirements except that such payments are made to another individual who (as determined in accordance with standards prescribed by the Secretary) is interested in or concerned with the welfare of such child or relative, or are made on behalf of such child or relative directly to a person furnishing food, living accommodations, or other goods, services, or items to or for such child, relative, or other individual, but only with respect to a State whose State plan approved under section 602 of this title includes provision for—

(A) determination by the State agency that the relative of the child with respect to whom such payments are made has such inability to manage funds that making payments to him would be contrary to the welfare of the child and, therefore, it is necessary to provide such aid with respect to such child and relative through payments described in this clause (2);

(B) undertaking and continuing special efforts to develop greater ability on the part of the relative to manage funds in such manner as to protect the welfare of the family;

(C) periodic review by such State agency of the determination under clause (A) to ascertain whether conditions justifying such determination still exist, with provision for termination of such payments if they do not and for seeking judicial appointment of a guardian or other legal representative, as described in section 1311 of this title, if and when it appears that the need for such payments is continuing, or is likely to continue, beyond a period specified by the Secretary;

(D) aid in the form of foster home care in behalf of children described in section 608(a) of this title; and

(E) opportunity for a fair hearing before the State agency on the determination referred to in clause (A) for any individual with respect to whom it is made;

(c) The term "relative with whom any dependent child is living" means the individual who is one of the relatives specified in subsection (a) of this section and with whom such child is living (within the meaning of such subsection) in a place of residence maintained by such individual (himself or together with any one or more of the other relatives so specified) as his (or their) own home.

(d) The term "family services" means services to a family or any member thereof for the purpose of preserving, rehabilitating, reuniting, or strengthening the family, and such other services as will assist members of a family to attain or retain capability for the maximum self-support and personal independence.

(e)(1) The term "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a)(1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment—

(A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

(B) such services as may be specified by the Secretary;

but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.

(2) Emergency assistance as authorized under paragraph (1) may be provided under the conditions specified in such paragraph to migrant workers with families in the State or in such part or parts thereof as the State shall designate.

Aug. 14, 1935, c. 531, Title IV, § 406, 49 Stat. 629; Aug. 10, 1939, c. 666, Title IV, § 403, 53 Stat. 1380; Aug. 28, 1950, c. 809, Title III, Pt. 2, § 323(a), 64

Stat. 551; Aug. 1, 1956, c. 836, Title III, §§ 321, 322, 351(b), 70 Stat. 850, 855; July 25, 1962, Pub. L. 87-543, Title I, §§ 104(a)(3)(D), 108(a), 109, 152, 156(b), 76 Stat. 185, 189, 190, 206, 207; Oct. 13, 1964, Pub. L. 88-641, § 2(a), 78 Stat. 1042; July 30, 1965, Pub. L. 89-97, Title IV, § 409, 79 Stat. 422; Jan. 2, 1968, Pub. L. 90-248, Title II, §§ 201(f), 206(b), 207(a), 241(b)(5), 81 Stat. 380, 893, 916.

42 U.S.C. § 608:

§ 608. Payment to States for foster home care of dependent children; definitions

Effective for the period beginning May 1, 1961—

(a) the term "dependent child" shall, notwithstanding section 606(a) of this title, also include a child (1) who would meet the requirements of such section 606(a) or of section 607 of this title except for his removal after April 30, 1961, from the home of a relative (specified in such section 606(a)) as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child, (2) whose placement and care are the responsibility of (A) the State or local agency administering the State plan approved under section 602 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of such State plan has made an agreement which is still in effect and which includes provision for assuring development of a plan, satisfactory to such State agency, for such child as provided in paragraph (f)(1) and such other provisions as may be necessary to assure accomplishment of the objectives of the State plan approved under section 602 of this title, (3) who has been placed in a foster family home or child-care institution as a result of such determination, and (4) who (A) received aid under such State plan in or for the month in which court proceedings leading

to such determination were initiated, or (B)(i) would have received such aid in or for such month if application had been made therefor, or (ii) in the case of a child who had been living with a relative specified in section 606(a) of this title within 6 months prior to the month in which such proceedings were initiated, would have received such aid in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made therefor;

(b) the term "aid to families with dependent children" shall, notwithstanding section 606(b) of this title, include also foster care in behalf of a child described in paragraph (a) of this section—

(1) in the foster family home of any individual, whether the payment therefor is made to such individual or to a public or nonprofit private child-placement or child-care agency, or

(2) in a child-care institution, whether the payment therefor is made to such institution or to a public or nonprofit private child-placement or child-care agency, but subject to limitations prescribed by the Secretary with a view to including as "aid to families with dependent children" in the case of such foster care in such institutions only those items which are included in such term in the case of foster care in the foster family home of an individual.

(c) the number of individuals counted under clause (A) of section 603(a)(1) of this title for any month shall include individuals (not otherwise included under such clause) with respect to whom expenditures were made in such month as aid to families with dependent children in the form of foster care; and

(d) services described in paragraph (f)(2) of this section shall be considered as part of the administration of the State plan for purposes of section 603(a)(3) of this title;

but only with respect to a State whose State plan approved under section 602 of this title—

(e) includes aid for any child described in paragraph (a) of this section, and

(f) includes provision for (1) development of a plan for each such child (including periodic review of the necessity for the child's being in a foster family home or child-care institution) to assure that he receives proper care and that services are provided which are designed to improve the conditions in the home from which he was removed or to otherwise make possible his being placed in the home of a relative specified in section 606(a) of this title, and (2) use by the State or local agency administering the State plan, to the maximum extent practicable, in placing such a child in a foster family home or child-care institution, of the services of employees, of the State public-welfare agency referred to in section 722(a) of this title (relating to allotments to States for child welfare services under sections 721 to 728 of this title) or of any local agency participating in the administration of the plan referred to in such section, who perform functions in the administration of such plan.

For purposes of this section, the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing; and the term "child-care institution" means a nonprofit private child-care institution which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing.

Aug. 14, 1935, c. 531, Title IV, § 408, as added May 8, 1961, Pub. L. 87-31, § 2, 75 Stat. 76, and amended July 25, 1962, Pub. L. 87-543, Title I, §§ 101(b)(2)(D), 104(a)(3)(F), (G), 131(b), 135(a)-(d), 155(a), 76 Stat. 180, 185, 193, 196, 197, 207; Jan. 2, 1968, Pub. L. 90-248, Title II, §§ 201 (e)(4), 205(c), 81 Stat. 880, 892.

45 C.F.R. § 233.90(c)(1)(v):

§ 233.90 Factors specific to AFDC.

• • •

(c) *Federal financial participation.* (1) Federal financial participation under title IV-A of the Social Security Act in payments with respect to a "dependent child", as defined in section 406(a) of the Act, is available within the following interpretations:

• • •

(v) *"Living with [a specified relative] in a place of residence maintained • • • as his • • • own home".* (A) A child may be considered to meet the requirement of living with one of the relatives specified in the Act if his home is with a parent or a person in one of the following groups:

(1) Any blood relative, including those of half-blood, and including first cousins, nephews, or nieces, and persons of preceding generations as denoted by prefixes of grand, great, or great-great.

(2) Stepfathers, stepmother, stepbrother, and stepsister.

(3) Persons who legally adopt a child or his parent as well as the natural and other legally adopted children of such persons, and other relatives of the adoptive parents in accordance with State law.

(4) Spouses of any persons named in the above groups even after the marriage is terminated by death or divorce.

(B) A home is the family setting maintained or in process of being established, as evidenced by assumption and continuation of responsibility for day to day care of the child by the relative with whom the child is living. A home exists so long as the relative exercises responsibility for the care and control of the child, even though either the child or the relative is temporarily absent from the customary family setting. Within this interpretation, the child is considered to be "living with" his relative even though

(1) He is under the jurisdiction of the court (e.g., receiving probation services or protective supervision); or

(2) Legal custody is held by an agency that does not have physical possession of the child.

45 C.F.R. § 233.90(c)(2):

§ 233.90 Factors specific to AFDC.

• • •

(c) *Federal financial participation.*

• • •

(2) Federal financial participation is available in:

(i) Initial payments made on behalf of a child who goes to live with a relative specified in section 406(a)(1) of the Social Security Act within 30 days of the receipt of the first payment, provided payments are not made for a concurrent period for the same child in the home of another relative or as AFDC-FC;

(ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis;

(iii) Payments made for the entire month in the course of which a child leaves the home of a specified relative, provided payments are not made for a concurrent period for the same child in the home of another relative or as AFDC-FC; and

(iv) Payments made to persons acting for relatives specified in section 406(a)(1) of the Act in emergency situations that deprive the child of the care of the relative through whom he has been receiving aid, for a temporary period necessary to make and carry out plans for the child's continuing care and support.

45 C.F.R. § 233.110:

§ 233.110. AFDC foster care

(a) *State plan requirements.* A State plan under title IV-A of the Social Security Act must:

(1) Provide that aid will be given in the form of foster care for each otherwise eligible child:

(i) Who was removed after April 30, 1961, from the home of a relative specified in the AFDC plan, as a result of a judicial determination that continuance in the home of the relative would be contrary to his welfare, for any reason, and who has been placed in foster care as a result of such determination; and

(ii) (a) Who, in or for the month in which that court action was initiated, was receiving AFDC, or would have received AFDC if application had been made, or

(b) Who lived with a relative specified in the AFDC plan within 6 months prior to the month in which that court action was initiated, and who would have received AFDC in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made for him; and

(iii) Whose placement and care are the responsibility of the State agency administering or supervising the administration of the AFDC plan, or, if the State so elects, are the responsibility of any other public agency, or type or types of pub-

lic agencies specified in the plan, with whom the State agency has a currently effective agreement that provides for development of a plan satisfactory to the State agency for AFDC-FC children in accordance with subparagraph (2) of this paragraph and that contains other provisions necessary to achieve the objectives of the State's AFDC plan.

(2) Provide for development of a plan for each child described in subparagraph (1) of this paragraph, so that:

(i) He will be placed in a foster family home or a child care institution in accordance with his needs;

(ii) His need for and the appropriateness of his care and services in such placement will be reviewed not less frequently than every 6 months;

(iii) Services will be provided to improve the conditions in the home from which he was removed or to make possible his placement in the home of another relative under the State's AFDC plan. (See § 220.19 of this chapter.)

(3) Provide that maximum use will be made of the services of employees of the State public welfare agency responsible for the plan for child-welfare services under title IV-B of the Act or of any local agency participating in the administration of such plan.

(4) Specify:

(i) In what types of child care institutions (private nonprofit, or public, or both), in addition to foster family homes, placement will be made; and

(ii) Whether payments will be made to foster homes and institutions only or also to other agencies.

(5) Provide that there will be specific criteria for determining the amount of payment for foster care in foster family homes and in child care institutions. In establishing rates of payment to institutions, only those items included for care in foster family homes will be included, and overhead costs of the institution will be excluded.

Under the requirements of this paragraph, provision must be made for both foster family care and institutional care in accordance with the individual child's needs; public institutions may be used, without Federal financial participation, to discharge the institutional obligation in whole or in part; and the use of institutions outside the State will also meet the requirement for the provision of institutional care.

(b) *Federal financial participation.* (1) Federal financial participation is available, effective January 1, 1968, in AFDC-FC payments not to exceed an average of $100 per month per recipient, made on behalf of children as specified in section 403 of the Social Security Act, who are included in the approved State AFDC plan and who are placed in a foster family home, or nonprofit private child-care institution, licensed or approved by the agency which is responsible for licensing or approval of such facilities in the State where it is situated. The maximum of $100 average per month per recipient may be disregarded when the State claims Federal funds under the provisions of section 1118 of the Act.

(2) Federal financial participation is available in AFDC-FC payments made to an individual providing care in a foster family home, to a private nonprofit child care institution, or to a cooperating public or nonprofit private child placement or child-care agency. [36 F.R. 3869, Feb. 27, 1971]

Ill. Rev. Stat. 1971, ch. 23, § 4-1.2:

§ 4-1.2. Living Arrangements—Parents—Relatives—Foster Care)

The child or children must (1) be living with his or their father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt, or other relative approved by the Illinois Department, in a place of residence maintained by one or more of such relatives as his or their own home, or (2) have been (a) removed from the home of the parents or other relatives by judicial order under the "Juvenile Court Act", approved August 5, 1965,[1] as amended, (b) placed under the guardianship of a county superintendent of public aid or the principal administrative officer in the Division of Child Welfare of the Department of Children and Family Services, and (c) under such guardianship, or other guardianship authorized prior to the effective date of this 1969 Amendatory Act, placed in a foster family home or child care institution licensed pursuant to the "Child Care Act", approved July 10, 1957, as amended,[2] or approved by that Department as meeting standards established for licensing under that Act. A child so placed in foster care who was not receiving aid under this Article in or for the month in which the court proceedings leading to that placement were initiated may qualify only if he lived in the home of his parents or other relatives at the time the proceedings were initiated, or within 6 months prior to the month of initiation, and would have received aid in and for that month if application had been made therefor.

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1. Chapter 37, § 701-1 et seq.
2. Chapter 23, §§ 2301 to 2329.

The conditions of qualification herein specified shall not prejudice aid granted under this Code for foster care prior to the effective date of this 1969 Amendatory Act.

Amended by P.A. 76-1199, § 1, eff. Sept. 4, 1969.

Ill. Rev. Stat. 1971, ch. 23, § 2212.05:

§ 2212.05 Facility for child care defined]

§ 2.05 "Facility for child care" or "child care facility" means any person, group of persons, agency, association or organization, whether established for gain or otherwise, who or which receives or arranges for care or placement of one or more children, unrelated to the operator of the facility, apart from the parents, with or without the transfer of the right of custody in any facility as defined in this Act, established and maintained for the care of children.

Ill. Rev. Stat. 1971, ch. 23, § 2212.17:

§ 2212.17 Foster family home and types of homes, defined]

§ 2.17. "Foster family home" means a facility for child care in residences of families who receive no more than 8 children unrelated to them, unless all the children are of common parentage, for the purpose of providing family care and training for the children on a full-time basis. The family's own children, under 18 years of age, shall be included in determining the maximum number of children served. The term "foster family home" includes homes receiving children from any State-operated institution for child care; or from any agency established by a municipality or other political subdivision of the State of Illinois authorized to provide care for children outside their own homes. The types of foster family homes are defined as follows:

(a) "Boarding home" means a foster family home which receives payment for regular full-time care of a child or children.

(b) "Free home" means a foster family home other than an adoptive home which does not receive payments for the care of a child or children.

(c) "Adoptive home" means a foster family home which receives a child or children for the purpose of adopting the child or children.

(d) "Work-wage home" means a foster family home which receives a child or children who pay part or all their board by rendering some services to the family not prohibited by the Child Labor Law[1] or by standards or regulations of the Department prescribed under this Act. The child or children may receive a wage in connection with the services rendered the foster family.

(e) "Agency-supervised home" means a foster family home under the direct and regular supervision of a licensed child welfare agency, of the Department of Children and Family Services, of a circuit court, or of any other State agency which has authority to place children in child care facilities, and which receives no more than 8 children, unless of common parentage, who are placed and are regularly supervised by one of the specified agencies.

(f) "Independent home" means a foster family home, other than an adoptive home, which receives no more than 4 children, unless of common parentage, directly from parents, or other legally responsible persons, by independent arrangement and which is not subject to direct and regular supervision of a specified agency except as such supervision pertains to licensing by the Department.

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1. Chapter 48, § 31.1 et seq.

Ill. Rev. Stat. 1971, ch. 37, § 701-2:

§ 701-2. Purpose and Policy.]

(1) The purpose of this Act is to secure for each minor subject hereto such care and guidance, preferably in his own home, as will serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should be given by his parents, and in cases where it should and can properly be done to place the minor in a family home so that he may become a member of the family by legal adoption or otherwise. (2) In all proceedings under this Act the court may direct the course thereof so as promptly to ascertain the jurisdictional facts and fully to gather information bearing upon the current condition and future welfare of persons subject to this Act. This Act shall be administered in a spirit of humane concern, not only for the rights of the parties, but also for the fears and the limits of understanding of all who appear before the court. (3) This Act shall be liberally construed to carry out the foregoing purpose and policy.

Ill. Rev. Stat. 1971, ch. 23, § 5001:

§ 5001. Purpose.] § 1. The purpose of this Act is to create a Department of Children and Family Services to provide social services to children and their families, to operate children's institutions, and to provide certain other rehabilitative and residential services as enumerated in this Act.

Ill. Rev. Stat. 1971, ch. 23, § 5005:

5005. Direct child welfare services.]

§ 5. To provide direct child welfare services when not available through other public or private child care or program facilities.

For purposes of this Section:

The term "children" means persons found within the State who are under the age of 18 years at the time of acceptance for service or care. The term also includes children under age 18 and children age 18 or more but under age 21 who (1) are in foster care under order of a court and (2) were, at any time before August 1, 1969, recipients of foster care under Sections 6-4 or 12-8.6 of "The Illinois Public Aid Code", approved April 11, 1967, as amended.[1]

The term "child welfare services" means public social services which supplement or substitute for parental care and supervision for the purpose of: (1) preventing or remedying or assisting in the solution of problems which may result in the neglect, abuse or exploitation of children; (2) protecting and caring for homeless, dependent or neglected children; (3) protecting and promoting the welfare of children, including the strengthening of their own families and counseling of family members; (4) providing adequate care of children away from their homes, where needed, in foster family homes or day care or other child care facilities; or (5) providing counseling for mentally retarded, physically, and socially handicapped children and their parents when not otherwise available.

The Department shall establish and maintain tax-supported child welfare services and extend and seek to improve voluntary services throughout the State, to the end that services and care shall be available on an equal basis throughout the State to the children requiring such services.

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1. Chapter 23, §§ 6-4, 12-18.6.

For the purpose of insuring effective state-wide planning, development, and utilization of resources for the day care of children, operated under various auspices, the Department is hereby designated to coordinate all day care activities for children of the State and shall:

(1) Develop a comprehensive day-care plan for the State which identifies high-priority areas and groups, relating them to available resources, and identifying the most effective approaches to the use of existing day care services. The plan shall include methods and procedures for the development of additional day care resources for children to meet the goal of reducing short-run and long-run dependency and to provide necessary enrichment and stimulation to the education of young children. Recommendation shall be made for State policy on optimum use of private and public, local, state and federal resources. A written plan shall be submitted to the Governor, annually, on January 1, and shall include an evaluation of developments over the preceding year, including cost-benefit analyses of various arrangements.

(2) The Department shall conduct day care planning activities within the following priorities:

(a) development of voluntary day care resources wherever possible, with the provision for grants-in-aid only where demonstrated to be useful and necessary as incentives or supports;

(b) emphasis on service to children of recipients of public assistance where such service will allow training or employment of the parent toward achieving the goal of independence;

(c) maximum employment of recipients of public assistance in day care centers and day care homes, operated in conjunction with short-term work training programs;

(d) care of children from families in stress and crises whose members potentially may become, or are in danger of becoming, non-productive and dependent;

(e) expansion of family day care facilities wherever possible;

(f) location of centers in economically depressed neighborhoods, preferably in multi-service centers with cooperation of other agencies;

(g) use of existing facilities free of charge or for reasonable rental wherever possible in lieu of construction.

(3) Based on its planning activities, the Department shall actively stimulate the development of public and private resources at the local level. It shall also seek the fullest utilization of federal funds directly or indirectly available to the Department.

(4) Where appropriate, existing non-governmental agencies or associations shall be involved in planning by the Department.

The Department shall establish rules and regulations concerning its operation of programs established to meet these purposes, including but not limited to adoption, foster care, family counseling, protective services, service to unwed mothers, homemaker service, return of runaway children, and interstate services.

The Department may provide financial assistance, and shall establish rules and regulations concerning such assistance, to persons who adopt physically or mentally handicapped, older and other hard-to-place children who immediately prior to their adoption were legal wards of the Department. The amount of assistance may vary, depending upon the needs of the child and the adoptive parents, but must be less than the monthly cost of care of the child in a foster home. Special purpose grants are allowed where the child

requires special service but such costs may not exceed the amounts which similar services would cost the Department if it were to provide or secure them as guardian of the child.

The Department shall accept for care and training any child who has been adjudicated neglected or dependent committed to it pursuant to the "Juvenile Court Act".[2] The Department may, at its discretion except for those children also adjudicated neglected or dependent, accept for care and training any child who has been adjudicated delinquent or as a minor in need of supervision, under the "Juvenile Court Act", but no such child shall be committed to the Department by any court without the approval of the Department.

The Department may assume temporary custody of any child (1) if it has received a written consent to such temporary custody signed by the parents of the child or by the parent having custody of the child if the parents are not living together or by the guardian or custodian of the child if the child is not in the custody of either parent or (2) if the child is found in the State and neither a parent, guardian nor custodian of the child can be located. The Department shall have the authority, responsibilities and duties that a legal custodian of the child would have pursuant to Section 1-12 of the "Juvenile Court Act".[3] A parent, guardian or custodian of a child in the temporary custody of the Department who would have custody of the child if he were not in the temporary custody of the Department may deliver to the Department a signed request that the Department surrender the temporary custody of the child. The Department may retain temporary custody of the child for 10 days after the receipt of the request, during which period the Department may

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2. Chapter 37, § 701-1 et seq.

3. Chapter 37, § 701-12.

cause to be filed a petition pursuant to the "Juvenile Court Act". If a petition is so filed, the Department shall retain temporary custody of the child until the court orders otherwise. If a petition is not filed within the 10 day period, the child shall be surrendered to the custody of the requesting parent, guardian or custodian not later than the expiration of the 10 day period, at which time the authority and duties of the Department with respect to the temporary custody of the child shall terminate. The Department may place children under 18 years of age in licensed child care facilities when in the opinion of the Department, such placement would be for their best interest. Payment for board, clothing, care, training and supervision of any child placed in a licensed child care facility may be made by the Department, by the parents or guardians of the estates of those children, or by both the Department and the parents or guardians, except that no payments shall be made by the Department for any child placed in a licensed child care facility for board, clothing, care, training and supervision of such a child that exceed the average percapita cost of maintaining and of caring for a child in institutions for dependent or neglected children operated by the Department. However, such restriction on payments does not apply in cases where children require specialized care and treatment for problems of severe emotional disturbance, physical disability, social adjustment, or any combination thereof and suitable facilities for the placement of such children are not available at payment rates within the limitations set forth in this Section.

The Department may receive and shall use, in its entirety, for the benefit of children any gift, donation or bequest of money or other property which is received on behalf of such children, or any financial benefits to which such childen are or may become en-

titled while under the jurisdiction or care of the Department.

Amended by P.A. 76-2041, § 1, eff. July 1, 1970; P.A. 77-1374, § 1, eff. Aug. 31, 1971.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

REGION V

433 WEST VAN BUREN STREET, ROOM 712
CHICAGO, ILLINOIS 60607

March 10, 1971

SOCIAL & REHABILITATION SERVICE

Mr. Gordon Watters, Chief

Division of Program Development
Department of Public Aid
209 West Jackson Blvd., Room 602
Chicago, Illinois 60606

Dear Mr. Watters:

This responds to your letter of October 19, 1970 asking whether Federal financial participation is available in payments under the AFDC program to relatives within the relationship specified in Section 406(a) of the Social Security Act.

Federal participation would not be available in such payments. Title IV of the Federal Act distinguishes between AFDC and AFDC Foster Care by providing (1) for assistance in behalf of needy children living with specified relatives and (2) for assistance under specified circumstances on behalf of children removed from the home of a specified relative and placed in a foster family home or child-care institution.

Even if the Federal Act permitted Federal matching, Illinois statutes seem to preclude a relative's home being considered a foster home. Section 2217.17 of State law defines a foster family home as a "facility for child care in residences who receives no more than 8 children *unrelated* to them . . . on a fulltime basis" (emphasis supplied). This definition is consistent with the traditional concept of a foster home in the child welfare field under which there is a distinct difference between a foster home and the home of a relative.

We wish to note that relatives caring for a child for whom they have no legal responsibility cannot be held responsible for any part of that child's living expenses. Therefore, the assistance grant must include all items in the State standards for AFDC that are included when a child lives with his parents or other needy relative. Only when the non-needy relative with whom he is placed freely contributes any of the requirements, may such contribution be considered as available in determining the amount of the payment. (See Program Regulation 20-7, CFR 233.20(a)(3)(ii)(c).

We question that your manual instructions make this policy entirely clear. For example. Section 1008.6 states, "an allowance to enable the recipient to pay his share of the total rent to a relative with whom he is living requires supervisory approval related to an evaluation of the total social and economic factors." This could be interpreted to mean that budgeting shelter cost for a child living with a self-supporting relative would be an exception to the general rule. The policy undoubtedly leads workers to assume income (contribution of shelter and other joint household expenses) in AFDC cases as well as in assistance to recipients in the adult categories. It should be modified and clarified to assure that budgeting practice does not assume income that is not actually available.

Many States have established a room and board standard plus clothing and personal incidental standard allowances for AFDC assistance to children living with self supporting relatives. This has the advantage of eliminating inquiry into the circumstances of the relative. Although such a standard might not equal the foster care rate, it would be more nearly comparable and reasonable; and it would be consistent with policy as stated in Handbook Section IV 3435.3 on the subject of AFDC children in "Homes with Relatives other than Parents." If such a standard is established it must apply in *all* cases in which children are living with non-needy relatives other than parents.

You also asked if the Department of Children and Family Services could pay a relative for care and supervision of the child recipient without affecting the AFDC grant. As long as there is no claim for Federal financial participation in such a payment and DCFS is able to make such payments under State law, no question would be raised. In effect, this would be income for the relative and not for the child.

We hope that these comments will be helpful to you in reconsideration of budgeting policy for children living with relatives other than their parents.

Sincerely yours,

/s/ EDWARD J. SIENICKI,
Acting Regional Commissioner,
SRS

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 73-6935

Supreme Court, U. S.
FILED
NOV 28 1975
MICHAEL RODAK, JR., CLERK

MARCEL YOUAKIM and LINDA YOUAKIM, individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Plaintiffs-Appellants,

v.

JEROME MILLER individually and as Director of the DEPARTMENT OF CHILDREN AND FAMILY SERVICES and the DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

REPLY BRIEF FOR APPELLANTS

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November 28, 1975

ORAL ARGUMENT SET DECEMBER 8, 1975

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REPLY BRIEF FOR APPELLANTS

SUMMARY OF REPLY

I. In this Reply, Plaintiffs-Appellants respectfully argue that the Defendant-Appellee State of Illinois officials have mistakenly interpreted the plain meaning of Sections 406(a) and 408 of the Social Security Act, 42 U.S.C. Sections 606(a), 608. In doing so the officials have failed to recognize that the Illinois statutory foster care scheme does engraft an additional criterion for AFDC-FC eligibility--placement in an approved home maintained by strangers--which is not found in the federal law. Defendants-Appellees have failed to recognize the true questions presented by the case and have mistakenly applied the rule of Dandridge v. Williams, 398 U.S. 471, 90 S. Ct. 1153 (1970), to the facts of this case. The Illinois state officials misinterpreted the legislative history, and have

violated logic, the intent of Congress, and the Supremacy Clause by their position that Plaintiff related foster children and foster parents are not foster children and foster parents within the meaning of the federal law.

II. The Illinois statutory foster care scheme is not rationally related to the overall legislative purpose of the state child welfare laws. The purposes and results achieved are directly contrary to the rational state interests the law seeks to serve. The scheme violates Equal Protection of Law. Some of the rational interests purportedly advanced are so ethereal as to nonexist. Defendants say that the Illinois scheme avoids fraudulent claims for foster care assistance, and stems a potential flood of applications. Yet both fraudulent claims and open floodgates are precluded by the Social Security Act itself.

The interest in the protection of children, if served, is protected at the

cost of doing violence to the main purpose of the state law: to preserve and strengthen families. The interests in encouraging adoptions and maintaining a large number of available foster homes are not served but rather harmed by the present law.

Finally, any state interest purportedly advanced by the discriminatory Illinois foster care scheme is based on an error of law: that the moral duty of non-parental relatives is the same as the legal duty of natural or adoptive parents. The District Court erred in equating them, and in their Brief Defendants-Appellees cumulate the error.

This Court should find that the Illinois laws challenged violate the Social Security Act, the Supremacy Clause and the Plaintiffs' constitutional right to Equal Protection of Law. The District Court's judgment should be reversed.

I. PLAINTIFFS MEET ALL THE FEDERAL CRITERIA FOR ELIGIBILITY FOR ASSISTANCE UNDER FOSTER CARE (AFDC-FC) PROGRAMS. ILLINOIS DENIES THEM ELIGIBILITY AND VIOLATES THE PURPOSE AND MEANING OF THE SOCIAL SECURITY ACT.

I. A.-B. Illinois has attempted to engraft an additional eligibility criterion onto those of the federal law.

Throughout its brief the Defendant-Appellee State officials respectfully and correctly cite the instances where this Court has struck down attempts by the states to exclude eligible persons from categorical public assistance benefits in violation of the Social Security Act. 1/

But while the Appellees understand the law properly, they urge an incorrect

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1 Appellee's Brief 12, 15, 16, 17, citing Townsend v. Swank 404 U.S. 282, 92 S.Ct. 502 (1972) King v. Smith 392 U.S. 309, 88 S.Ct. 2128 (1968) Lewis v. Martin 397 U.S. 552, 90 S.Ct. 1282 (1970) Carleson v. Remillard 404 U.S. 598, 92 S.Ct. 1932 (1972) Van Lare v. Hurley ___U.S.___, 95 S.Ct. 1741 (1975).

application based on their erroneous view of eligibility. Relying heavily on this Court's opinion in Dandridge v. Williams 398 U.S. 471 90 S.Ct. 1153 (1970) Defendants would have this Court believe that the only basis for Plaintiffs' claim is that the level of payment is different, and lower, for foster children living with relatives than for children placed with strangers.

This argument is misleading. Unlike Dandridge, supra; the Youakim case is not about the difference in level of payment between similarly situated but distinguishable members of the same class. Rather the questions are: first, for which program of categorical assistance are the Plaintiffs eligible? Second, if Plaintiffs are eligible for assistance under the foster care (AFDC-FC) program, in that they meet all the eligibility criteria in the federal

law, can the state ever deny those payments?

The responses to these questions are fixed by the current law: first, Plaintiffs and the members of the class they represent are eligible to participate in the foster care program because they meet all the eligibility criteria of the Social Security Act. Second, the state may not deny them the payments which persons who are eligible for the AFDC-FC program normally receive.

In its brief (at 14-21) the State of Illinois takes the curious position that the statutory scheme which bars AFDC-FC payments to state wards living in approved foster homes maintained by their relatives is really no "bar" at all since the plaintiffs are (or may be) eligible for the lower AFDC payments. So long as every foster child is eligible for something, the state argues, the scheme

is saved. But, following the reasoning of this Court in one of its most recent decisions, the State of Illinois is incorrect when it characterizes its scheme as consistent with the overall purpose and meaning of the Social Security Act. (Appellees Brief, 38).

In Philbrook v. Glodgett ____U.S. ____, 95 S.Ct. 1893, decided June 9, 1975, this Court considered the contention by the State of Vermont that it could bar eligibility for participation in the AFDC program to persons who meet all the federal eligibility criteria for the payments. The sole basis for the denial was the state's contention that the plaintiffs might be eligible for another categorical assistance program at a lower payment level, i.e., state or federal aid to families of the unemployed (AFDC-U). The bar would operate whether or not

the AFDC-U payments were actually received.

According to the Vermont officials, the mere fact of eligibility for unemployment compensation (AFDC-U, Section 407, 42 U.S.C. Sec. 607) payments precluded eligibility under the regular AFDC program. (Section 406(a) 42 U.S.C. Sec. 606(a).) But the Social Security Act itself neither set up such a bar nor granted the states the option to deny AFDC eligibility to persons who might be eligible for unemployment compensation. Accordingly this Court held the Vermont scheme unconstitutional. ____U.S.____, 95 S.Ct. 1893 (1975).

In Philbrook the State of Vermont made virtually all the arguments about the legislative history and H.E.W. Regulations that Illinois makes in Youakim. But there too, the Social Security Act itself made the plaintiffs eligible for

payments. [2] This Court, as it has many times before, again declared that the state "May not deny aid to persons who come within (a particular categorical assistance program) in the absence of a clear indication that Congress meant the coverage to be optional." Philbrook. supra, Burns v. Alcala ___U.S. ___, 95 S.Ct. 1180 (1975), King v. Smith 392 U.S. 309, 88 S.Ct. 2128 (1968) Townsend v. Swank 404 U.S. 282, 92 S.Ct. 502 (1972) Carleson v. Remillard 404 U.S. 598, 92 S.Ct. 1932 (1972).

Nothing in Title IV indicates that the states have the option to withhold from the categorical assistance under the foster care program from the plaintiffs here. [3]

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[2]See Section 407(b) (2) (c) ii, 42 U.S.C. Sec. 607.

[3]Illinois does consider the

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3 (Continued) Plaintiff foster parents to be participants in the state foster care program for certain of its own purposes: e.g., the government requires the Youakims to meet and maintain the same standards as licensed foster homes, and to submit to regular inspections, visits and reports by DCFS caseworkers. But despite the increased costs which the Youakims must bear in order to meet the same standards and perform all the same duties of foster parents who are strangers, the state does not subsidize the plaintiff children commensurately with the increased costs. The related foster parent must providethat subsidy. Plaintiffs incur all the duties and costs the same as all the state's foster parents. Yet for puroses of receiving the full foster care subsidy, the state says they are not foster parents.

The state repeatedly cites Dandridge v. Williams 398 U.S. 471 90 S.Ct. 1153 (1970) for the proposition that so long as plaintiffs receive some level of some kind of payments under Title IV of the Social Security Act they cannot complain. The defendants correctly state that the question of plaintiffs' eligibility to receive some public assistance is simply not involved. Everyone agrees that they are eligible for something; and defendants argue that since plaintiffs are eligible for something, then the Illinois scheme does not violate the Social Security Act.

But the Dandridge case is not applicable here. The issue in Youakim is: Under which program, AFDC (Section 406(a)) or the foster care program (AFDC-FC, Section 408) should the plaintiffs receive assistance?

Dandridge was not concerned with

the question of under which program an applicant is eligible. Jefferson v. Hackney, 406 U.S. 535, 92 S.Ct. 1724 (1972) is more on point. In that case the Court sustained the state's action in granting higher subsidies to applicants under one program (Old Age Assistance) than under others (Blind and Disabled and AFDC). The Texas legislature could conclude that different categories of recipients had different levels of need, and fix the percentage of budget payments accordingly. But prior to the instant case, no court has suggested that if a citizen may happen to be eligible for assistance under one categorical assistance program then he is barred from eligibility for all others, and must always receive the lowest level of assistance. 4/

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[4]This Court held the contrary in

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(Continued) Philbrook v. Glodgett, supra. There is also contrary authority in the Social Security Act itself. See Section 402(a) (24), 42 U.S.C. Sec. 602 (a)(24), which excludes any S.S.I. benefits from determination of the amount of family income for AFDC purposes. The effect of this new subsection, (effective January 4, 1975) is to ensure that persons and families perhaps eligible under more than one categorical assistance program would receive the higher payments that Congress intended. See Title XVI generally, 42 U.S.C. Sec. 1381.

This is what the Defendants-Appellees argue. It is uncontested that the plaintiffs meet the federal eligibility criteria. They have been removed from their own home and declared wards of the state. They have a right to placement in the best home possible since they cannot live in their own home. They have a right to and a need for the full foster care subsidy of $105 per month to support themselves. But Illinois then removes eligibility when the child is placed in the home which is in fact and by declaration of policy, the best one for him. Illinois imposes an additional criterion: the placement must be with strangers, in order for the foster child fully to participate in the state's foster care program.

Plaintiffs, foster children placed in an approved foster home maintained by their relatives, meet the only

requirements for eligibility set out in the Social Security Act. They are court-declared wards of the state who have been removed from their own homes and they need assistance. [5/] The federal law contains no other criteria. The state attempts to engraft another requirement for eligibility, one which attaches after the fact as a result of the state's action. This engraftment means that eligibility is denied in those cases where the state does right by the children and places them in foster care in the homes of relatives. This violates the federal law.

In Townsend v. Swank 404 U.S. 282, 92 S.Ct. 502 (1972) the federal law set out two eligibility criteria for public aid recipients over age 18: need, and

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[5]See: Memorandum of the United States as Amicus Curiae at 4, filed herein, February 1975. See Appellants' Brief, 26.

participation in some kind of educational program. Illinois attempted to engraft an additional criterion: the educational program had to be high school or trade school--not frivolous college education. The attempt violated the federal law and this Court found the practice unconstitutional. So it should do in the instant case.

I. C. Defendant -Appellant state officials have misinterpreted the legislative history of the federal foster care program.

While the Appellees, in their brief (Sec. I-C, 28-33) attempt to show that the legislative history of the foster care program supports the state's position, the more reasonable interpretation of it is the one suggested by the plaintiff foster children.

As the state points out (at 28-29) Congress did in 1935 and has continuously

since recognized that the children who are cared for in institutions and in foster care "are in many respects the most unfortunate of all children, as their lives have already been impaired." Congress recognized the need to provide services which would be nationally and uniformly available for these children and for that purpose authorized a small amount of aid under Title V. S. Rep. No. 628, 74th Cong. 1st Sess. 19 (1935). Thus was the federal foster care program conceived, originally under Title V, and much later under Title IV, Section 408, the present law. 42 U.S.C. Sec. 608, as amended.

The state cites the history of Section 408 to show that the main purpose of the foster care program is the protection of children. (Appellee's Brief 30). This interpretation is reasonable and reasonably accurate. The difficulty

arises in the contention that this purpose overrides and displaces the overall purpose to maintain and strengthen family ties. (42 U.S.C. Sec. 601, Appellant's Brief 32 ff.) In order to protect children the way the state suggests, the overall stated purpose of Title IV must be perverted: families are pulled apart. If the plaintiffs prevail, both purposes of protection of children and preservation and maintenance of family ties will be advanced by placement in an approved foster home operated by a relative.

Plaintiffs-Appellants respectfully agree that the interpretation they advance is clear, unambiguous, and consistent with the legislative history and congressional purpose as set out more fully as follows.

The key characteristic of the children Congress sought to serve, the

quality that caught the attention of the Congress, was that the court had to remove the children from their own homes. It was for this reason that it voted a moreintensive and higher level of services for the foster children whose lives had been damaged by the court-ordered removal (see discussion in Appellee's Brief, 22-23). Obviously, the Plaintiff children have suffered this unfortunate experience.

The AFDC-FC eligibility--and congressional concern--attach the moment the juvenile court's gavel falls. At that time the court and the appointed guardian probably have no idea where the child will eventually be placed. It would be most unlikely that Congress intended for eligibility for AFDC-FC assistance to attach for awhile, but then evaporate in the face of the availability of the best placement--one

in an approved foster home maintained by relatives. And the best placement can occur only if the relatives are able to pay a tax of $42.00 per month per child. (Cf. Appellants' Brief p. 40-41). 6/

I.D. Plaintiff foster parents are foster parents and Plaintiff foster children are foster children within the meaning of the federal foster care (AFDC-FC) program.

Any child who has been removed from his own home by court action and declared to be a ward of the state is subject to and in need of the more intensive government intervention required under the state's foster care program. All of the state's foster children, regardless of with whom they live, do in

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6The "tax" may be higher than $42 if the child is not receiving regular $63 AFDC payments under Sec. 406(b) the same as he would receive in his own home.

fact receive the different, more intense degree of governmental intervention needed to repair their damaged lives. All the state's wards, all its foster children, including Plaintiffs, are placed in homes which meet higher standards than "regular" AFDC Sec. 406(a) homes. The homes are more carefully and more often inspected, and must generally conform to high standards of space, cleanliness and quality of family life. These standards are imposed on the homes of all persons who provide foster care, whether they are maintained by relatives or strangers to the foster children placed with them.[7/] This Court

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[7]From the outset Plaintiffs Youakim have alleged that their home, and the related homes in which other class members are placed, comply with the same standards as all foster homes. (Complaint, Paragraph 17, 18 App. 9). Plaintiffs and in fact all foster parents ask the Court to note that it costs more to maintain a home that complies with

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(continued) the strict licensing standards for foster homes. Congress agrees with them. Sen. Rep. No. 744, 90th Cong. 1st Sess. 1967 U.S. Cong. & Adm. News. V. 2 3001, 3002. Cf. Appellant's Brief 35-36.

has likewise recognized the greater cost of foster care. Ramos v. Montgomery 313 F. Supp. 1179 (S.D. Cal. 1970) aff'd 406 U.S. 1003, 91 S. Ct. 572 (1971).

A second characteristic of the Plaintiff children which places them squarely within Section 408 eligibility [in contrast to recipients of regular AFDC living with non-parental relatives (Section 408a)] is the degree of support services provided them by the State. All state wards--foster children, including Plaintiffs, theoretically have in addition to a regular welfare caseworker, a specialized DCFS caseworker assigned to them to provide monitoring and guardianship services which are not available to children who receive assistance under Section 406(a). All state wards--foster children, including Plaintiffs theoretically must have a written casework plan designed to improve the

conditions in and facilitate the return to the [Section 406 (a)] homes from which they were removed. Sec. 408 (f) (1) 42 U.S.C. 608 (emphasis added). The guardians of all state wards--foster children, including Plaintiffs, must file with the juvenile court annual reports on the status and progress of their wards, Juvenile Court Act, Ill. Rev. Stats. Ch. 37, Sec. 705-8 (2). No such reports are required for children who receive regular AFDC under Sec. 406(a).

The State of Illinois recognizes that all its wards--all its foster children, including Plaintiffs, do need more, and more expensive, government intervention "to repair their damaged lives." It provides the greater services to all the foster children, including Plaintiffs in the state. It provides the $105 foster care subsidy

to all foster children in the state except the members of the Plaintiffs' class who must, with their related foster parents, themselves bear the costs of the increased services. To say that one of the state's foster children like Timothy Robertson is "no longer considered to be receiving foster care." [8] once he is placed in the approved relative's home which meets all the standards for foster care, for the purpose of receiving foster care, and where he does receive foster care and where he is subject to the same government intervention and monitoring services required for all foster children is at best difficult to comprehend.

In light of this Court's comments in Burns v. Alcala __U.S.__, 95 S. Ct. 1180 (1975), Plaintiffs-Appellants

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[8] As Appellees say in their Brief, 31.

do not wish to engage in a battle of the dictionaries.[9] To do so is irrelevant, since the only issue here is how Congress meant to use the term foster care, a legal term of art, when it enacted the amendments to Title IV. Plaintiffs-Appellants believe that the term, as used by Congress, includes services and assistance provided pursuant to Section 408 (42 U.S.C. Section 608) to children who have been removed from their own homes, adjudicated wards of the Court, and placed in an approved home which meets all the State licensing standards. Plaintiffs

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[9] For every dictionary definition the Appellees produce with the term "unrelated" or its equivalent in the definition of foster care. Appellants can produce one without the term. Cf. the Oxford English Dictionary; the Random House American Dictionary.

believe they are included in the term.

The United States in its amicus brief on behalf of the Department of Health, Education and Welfare agrees. The most recent policy directive of H.E.W, includes the Plaintiff foster children and foster parents in the federal program.

The Appellees' position is untenable because of its internal-inconsistency. The state says on the one hand that since the Plaintiff children are living with relatives they cannot participate in, and receive benefits under the AFDC-FC program, and then it requires them to perform virtually all the duties required of foster parents under that program.

Unlike Dandrige, this case is not about a difference in level of payments paid out to similarly

situated persons eligible for the same categorical assistance program. Rather this case is like Jefferson v. Hackney, supra or Philbrook v. Glodgett, supra where the question is in what category do Plaintiffs belong? Because they are declared wards of this Court; because they have been removed from their own home (i.e. the home of parent or close relative) where they were eligible for AFDC within the previous six months; because they are placed in homes which meet all the standards for a foster care license; because they receive all the support, casework and guardianship intervention required for and needed by foster children, the Plaintiffs are foster children. They are in foster care program (Sec. 408) category. They must

receive the full foster care subsidy like all the other state wards--foster children in Illinois.

II. THE ILLINOIS FOSTER CARE SCHEME WHICH DISCRIMINATES AGAINST THE PLAINTIFF CLASS OF FOSTER CHILDREN VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

II. A. No rational state interest is served by the Illinois foster care scheme which denies assistance to Plaintiffs.

A discriminatory scheme like the Illinois foster care system will be sustained only if the discriminatory classification advances some rational state interest. The various interests that the state suggests may be advanced by the challenged Illinois Statutes are here considered in the order in which they appear in Appellees' Brief. (43 ff.)

1. Provide as many (strangers') foster homes as possible (44, 47).

2. Encourage non-parental relatives to care voluntarily for children who do not live with their parents and who have not been adjudicated wards of the state, and encourage adoptions (at 48).

3. Avoid a flood of petitions to have children adjudicated state wards, and by implication, avoid fraudulent claims (48-49).

4. Avoid discrimination against (and lawsuits on behalf of) non-parental relatives who provide care for children and receive regular AFDC (Section 406a) assistance.

Not specifically set out in the state's brief is the overriding, primary purpose of Illinois child welfare laws:

5. To render service to maintain and strengthen families. (Cf. Appellants Brief 45 ff. and n. 13) In order to pass constitutional muster the challenged statutes cannot be inimical to the overall purpose of the state's child welfare scheme.

Plaintiffs comment on these interests

in turn:

1. The state has not reached its goal to establish the largest number of foster care resources in the homes of strangers. Plaintiffs have alleged--and could prove--that there is a serious shortage of available foster care resources with strangers.[10/] The avowed

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[10]Illinois, like all the states, still has a large number of its children in institutions. Plaintiff Larry Robertson lived in an orphanage until September 1974. Since then he has lived with the Youakims, a fortunate beneficiary of the state's bizarre "exception to policy" policy (Cf. Appellant's Brief 9. n. 1) It is important to note that once full foster care payments were available to Larry that an excellent foster home--the Youakims'--could be found for him. It is a gross comment on the irrationality of the system that Larry was not placed in foster care until age 15, and that it took 28 months from the filing of his federal complaint to secure foster home placement and payment. Larry had wanted and hoped to live with the Youakims for over two years. They wanted to take him in. But the family was kept separated because of the discriminatory denial of foster care payments. Only after two years of litigation, and after he had

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[10](Continued) filed his appeal in the U.S. Supreme Court, did the Defendants decide Larry to be worthy of benefit from the "exception to policy" policy.

purpose of the present law, to develop more resources, has not been achieved. The best source from which the resources could be developed--the relatives of the state's wards--is effectively foreclosed by the challenged law.

2., 3., and 4. The purported purposes of encouragement of non-parental relatives to care for children who cannot live with their parents, and the interests in avoiding fraud, floodgates and discrimination are answered in the Social Security Act. The state's fear that non-parental relatives who now receive AFDC benefits for nonadjudicated children will all appear at the juvenile court and file wholesale petitions, legitimate or fraudulent, to have their charges found to be abandoned or neglected and declared to be state wards is groundless. (Appellees Brief 48-49, n. 18). The present system, the state

suggests, dams the flood and dodges the fraud.

These concerns by the Defendants, and the state's interests in avoiding the flood and fraud problems, arise out of an incomplete or mistaken reading of the Social Security Act. The federal law itself, by its definitions of eligibility, foreclosesthe problems.

The two main eligibility criteria for participation in the AFDC-FC program: 1) state wardship and 2) removal from the home of a relative by court action. 42 U.S.C. Sec. 608 (a)(2)(B)(4)(B)(ii). In order for a child who is not a state ward and who lives with non-parental relatives to receive assistance under the foster care program it would be necessary for the juvenile court 1) to declare him to be a state ward, and 2) to order him removed from the home of the relative with whom he

had been living before the court's intervention. Thus, the non-parental relatives who now provide Section 406(a) homes for children, have absolutely no economic incentive to seek a neglect finding. They cannot become the related foster parents of the children for whom they care because the statute requires, as a condition of eligibility for foster care (AFDC-FC) assistance, removal from the home in which the child has been living. In the cases of children who live with non-parental relatives who receive regular AFDC payments, the overall family income would actually decrease if the court removed a child. Cf. 42 U.S.C. Sec. 606(a).

For the same reason there is no substance to the state's speculation that an acceptance of plaintiffs' position may result in a denial of equal protection to relatives caring

for related children without an intervening court adjudication. (Appellants Brief at 49). This question likewise does not arise in this case. The federal statute sets the eligibility standards for participation in the AFDC-FC assistance program under Section 408. It would be impossible for the non-adjudicated children to meet the eligibility criteria and remain in the same home.

The question of the economic disincentive to adoptions by the non-parental custodial relatives is similarly absent from this case. Since the federal eligibility criteria leave no possibility for non-parental relatives to secure foster care payments for their non-adjudicated wards, there is no sense to the argument that the possibility of AFDC-FC payments may discourage adoptions. 11/

[11]In fact the economic incentives run the other way. The Illinois Department of Children and Family Services will pay long-term support to persons willing to adopt older and "hard-to-place" children. Ill Rev. Stats. Ch. 23, Sec. 5005. (App. 23, 25-26.) These adoption subsidies are available to all persons, including non-parental relatives. The richest source for adoptive parents for older and "hard-to-place" children is foster parents. Logically, related foster parents would be the best candidates of all because of their prior lifelong relationship with the children. The subject of subsidized adoptions in relation to foster care is discussed at length in a recent report prepared by the Defendants. See Hargrave, Shireman, and Connor, Where Love and Need Are One: A demonstration of the use of subsidy to facilitate the adoption of black children in need of permanent homes. Report of Study Grant OED CB. 71. Ill. DCFS 1975, 110 p., esp. Chapter III. "The Children in Foster Care." Three copies of this Report have been lodged with the Clerk of the Supreme Court.

5. The last and paramount state interest which must be advanced by the challenged foster care scheme and by the entire state child welfare setup is to service, maintain and strengthen families. Plaintiffs have argued in their Brief that this overriding purpose is disserved and perverted by the present law. The economics of the Illinois foster care scheme discourage and prevent placement with related foster parents. Families are not strengthened by the present foster care system. They are literally pulled apart.

Defendants themselves graphically paint this picture in their recent report on the Illinois subsidized adoption programs.[12/] The report described

[12]Hargrave, et. al. Where Love and Need are One., Ill. DCFS (1975) 110 pp. Cf. Note 11 supra.

the attempt by the Defendants to secure adoptive homes for as many children as possible from a group of 1,900 black children in Chicago, virtually all of whom were in foster homes or institutional placement. The Report states:

> The children in the total sample were, as has been noted, young at separation from parents, the mean age being 3.7 years. Indicative of an expected total absence of relationship with parents, 23 percent had never lived with their parents. Of the 750 oldest children (over 12 years of age) only 9 percent had lived with their parents since they were 12. Sixty-nine percent last lived with parents at under six years.
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> Thus it is evident that, whatever the reason for entering foster care, these children had relatively few family ties, perhaps because they had been in care so long. Twenty-five percent had ties with the mother, 12 percent had ties with relatives and only 9 percent with their father. (O)nce in foster care, it seems there is little likelihood of a child's maintaining contact with this family over a period of years, and little likelihood of actually returning home. Id at 23. (emphasis added)

And:

> In sum these children entered foster care at a young age for various reasons; a high proportion due to parental neglect or abandonment. Once in care a variety of patterns of contact with relatives developed, but an amazingly high proportion of children lost contact with biologic families, except for siblings in the same foster home. An exception is the one-third of the children who entered care due to parent neglect or because of their own behavior problems and retained contact with families over the years. This raises interesting questions about the possibility of preventive or rehabilitative services for this group of families. Indicative of the failure to involve the parents of these children in decision-making, 75 percent of the parents had no plan which was known to the Department caseworker for the termination of foster care. Id at 24-25.(emphasis added)

The present Illinois foster care scheme does not strengthen families. Plaintiffs assert that the best interests of the State of Illinois and of its foster children would be best served if

this Court reverses. The end result might be a net savings for the taxpayers and improved placements for the foster children.

If full AFDC-FC payments were available to children who receive foster care in approved homes maintained by their relatives four desirable results would obtain:

1. The cost of finding, recruiting, and approving or licensing foster homes would be reduced;

2. More children whom the court decided had to be removed from their parents would live with relatives;

3. Some children could move out of foster homes maintained by strangers and into approved foster homes maintained by their relatives. Thus there would be more already recruited and licensed homes available for children whose relatives could not provide foster care services;

4. Some older, "hard-to-place" children (like Plaintiff Larry) who are now in institutional care, or who have to be placed in a series of foster homes (with attendant economic and psychological costs) could be placed with relatives.[13]

This Court should declare the challenged discriminatory practice unconstitutional so that the state interests now allegedly served can in fact be served--to do so would give effect to the overall state and federal purpose to maintain and strengthen family life.

II. B. <u>The State's entire case is based on an error of law: i.e., that the moral duty of relatives is the same as the legal duty of parents.</u>

Nothing in Defendants-Appellees extensive discussion of the "moral duty"

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[13]See n.10 supra

of non-parental relatives to care for their foster children answers or negates Plaintiffs' position.

In Illinois, only natural and adoptive parents have a legal duty to support their children. Ill. Rev. Stats. Ch. 23, Sec. 2-11. Neither foster parents nor non-parental relatives have any similar or analogous legal duty. The emotional advantages of the familial bond cannot be translated into a financial duty where the law has imposed none. See Appellants' Brief 11.

It is proper and permissible for the state to recognize the emotional and social well-being flowing from the family relationship when it seeks to place children with relatives after a judicial determination that the child must be removed from his own home. To do so is consistent with the Social Security Act. A state which refuses to

recognize this in making its foster placements violates that Act.

But the state cannot expand this "sense of family spirit" (Appellees Brief p. 46) into a presumption of contribution of money where no legal means of enforcing such contribution exists. The state is barred from assuming that non-legally responsible persons will apply their resources to aid the child.[14/] The District Court indulged the assumption, or allowed the Defendants to indulge in the assumption that related foster parents should and would in fact willingly contribute a substantial part of the financial obligation owed by the state as guardian to its wards.[15/]

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[14]See Lewis v. Martin, 397 U.S. 552, 90 S. Ct. 1282 (1970), Van Lare v. Hurley ___U.S.___, 95 S.Ct. 1741. Marotti v. White, 312 F. Supp. 823 (1972)

[15]This is not a welfare case where the state can rely on the principle that the recipient has no constitutional right to

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[15](Continued) have all his needs met. Rosado vs. Wyman 397 U.S. 397, 90 S.Ct. 120 (1970), Jefferson Hackney, supra, Dandridge v. Williams, supra. Defendants are the guardians of the persons of the ward. They stand in the same position as the parents. The state is the parent, and as such has the legal duty to care for all the needs, in particular all the financial needs of its wards. Ill. Rev. Stats. Ch 3, Sec. 139; Ch. 23 Sec. 5005. (1973).

This was error. The trial court then found that the Illinois scheme did not violate equal protection because the foster parents who were related to their foster children could be legally distinguished from foster parents who were strangers. The basis for the distinction is that their "moral duty" to support their kin gives rise to an expectation, cognizable at law, that they will in fact do so. The Illinois state legislature and DCFS could rationally take this expectation into account in constructing its foster care program. Youakim v. Miller 374 F.Supp. 1204 (N.D. Ill. 1974).

The District Court erred in its conclusion that the state could assume the Plaintiff related foster parents had the same duty to support their foster children as had the natural parents in Ramos v. Montgomery. 313 F. Supp. 1179,

(S.D. Cal. 1970) aff'd 400 U.S. 1003 91 S.Ct. 572 (1971). Its finding, based on this conclusion, that the Illinois scheme does not violate the Equal Protection Clause is a mistake. This Court must correct it, and reverse the judgment below.

CONCLUSION

For the reasons stated herein and in the Brief for Appellants, Plaintiffs-Appellants respectfully ask that the District Court's summary judgment for Defendants be reversed with directions to enter summary judgment for Plaintiffs, or in the alternative, to set the matter for trial.

Respectfully submitted,

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